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No. 90-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHENEY RAILROAD COMPANY, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the canon of construction known as *expressio unius est exclusio alterius* is a "traditional tool of statutory construction" dispositive of legislative intent under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether individual provisions of the Interstate Commerce Act can be construed independently of the National Rail Transportation Policy, 49 U.S.C. Section 10101a.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the Court of Appeals below:

Cheney Railroad Company, Inc.,[1]
Petitioner

Interstate Commerce Commission,
Respondent

United States of America,
Respondent

Tyson Foods, Inc.,
Intervening Respondent

CSX Transportation, Inc.,
Intervening Respondent

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[1]Cheney Railroad Company, Inc., has neither a parent company nor any subsidiary companies.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-

CHENEY RAILROAD COMPANY, INC., PETITIONER
v.
INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cheney Railroad Company, Inc., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit denying its petition for review of decisions of the Interstate Commerce Commission.

OPINIONS BELOW

The opinion of the court below (App. A, 1a-25a)[1] is reported at 902 F.2d 66 (1990). The order denying rehearing (App. B, 26a-30a) is reported at 902 F.2d at 71 (1990). The court's order denying *en banc* rehearing (App. C, 31a-32a) is unreported.

JURISDICTION

The judgment of the court below was entered April 27, 1990; the orders denying rehearing and rehearing *en banc* were entered June 28, 1990. On August 31, 1990, the time period in which to file this petition was extended thirty days. The jurisdiction of this Court is invoked

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[1]This and subsequent references in parentheses are to the separate Appendix; its page numbers are identified by an "a" suffix.

under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. Section 706, and Interstate Commerce Act, 49 U.S.C. Sections 10101a, 10905, 10910 and 11345, and regulations of the Interstate Commerce Commission, 49 C.F.R. Part 1151, are set forth in Appendix D (33a-60a).

STATEMENT OF THE CASE

The amended Interstate Commerce Act allows qualified interested parties to purchase rail lines which rail carriers no longer wish to operate, in order to promote continued freight transportation

to the areas served by such lines. 49 U.S.C. §§ 10905, 10910. *See generally Simmons v. ICC,* 871 F.2d 702 (7th Cir. 1989); *Chicago and North Western Transportation Co. v. United States,* 678 F.2d 665 (7th Cir. 1982). Under 49 U.S.C. Section 10910, known as the feeder line statute, the Interstate Commerce Commission ("ICC" or "Commission") can require the sale of a line to a qualified applicant if certain conditions spelled out in the statute are met. This petition challenges the ICC's policy of simultaneously reviewing, and eventually approving, multiple applications for the same segment of line, and the reviewing court's reasoning in affirming that policy. This petition also questions the

refusal by that court to review the ICC's consideration of the relative effects on competition which granting two applications will have, where one applicant spoils the competitive position of the other.

This case arises out of an attempt to purchase and operate 54.61 miles of rail line extending between Greens and Ivalee, Alabama. In 1983 the line was designated as a candidate for eventual abandonment by its then owner, Seaboard System Railroad, Inc., which later merged into CSX Transportation, Inc. ("CSXT"). Because the rail line provided an essential means of transportation to and from the Graystone, Alabama, plant of Cheney Lime & Cement Company, the owner of that

limestone products company, Alan B. Cheney, decided to form Cheney Railroad Company, Inc. ("Cheney"), and purchase the line. Negotiations were unsuccessful, however, as CSXT conditioned sale of the line on unreasonable terms and conditions, such as an agreement by Cheney not to handle overhead traffic.[2]

Cheney refused to accede to such demands, as the line's ultimate viability was dependent upon the amount of overhead traffic it could attract and retain. In March of 1987 Cheney filed an application with the ICC to force the sale of the line

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[2]"Overhead traffic" is comprised of those rail shipments which neither originate nor terminate on the subject rail line, but rather pass over it from and on to other rail lines. During negotiations CSX had been siphoning off overhead traffic carried on the line and rerouting it on another of its lines.

upon terms and conditions to be set by the Commission, pursuant to the authority granted under the feeder line statute.[3]

Under its regulations, the Commission will accept applications from other parties interested in acquiring the line for thirty days following filing of the primary application. 49 C.F.R. § 1151.2(d).[4] On the last day on which the Commission would accept competing applications, an application was received

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[3]Under the feeder line statute, a line which is designated on a rail carrier's system diagram map as slated for abandonment, but for which an abandonment application has yet to be filed, is eligible for forced sale. 49 U.S.C. § 10910(b)(1)(A)(ii).

[4]49 U.S.C. Section 10910(k) granted to the Commission the authority to "prescribe such regulations and procedures as may be necessary to carry out the provisions of this section." Cheney's challenge to the Commission's policy of accepting and considering competing applications for the same segment of rail line is the first since the regulation was promulgated.

from Tyson Foods, Inc. ("Tyson"), not for the entire 54.61 miles, but only for the 1.46 miles at the northeast end of the line at Ivalee (along with an additional .15 mile segment not sought by Cheney).[5]

Tyson sought that segment of line to provide rail service to a facility it had just recently decided to construct in the immediate vicinity of that line segment. From the outset it was apparent that if the Tyson application was approved by the Commission and the sale ultimately consummated, Tyson would operate an industrial spur serving only its new plant, thus cutting what had once been

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[5]Because this .15 mile segment was not designated as a candidate for abandonment on CSXT's system diagram map, it could only be purchased if the ICC were to find its sale was consistent with the public convenience and necessity. 49 U.S.C. § 109010(b)(1)(A)(i).

part of a Birmingham-Atlanta main line. Cheney would be effectively prevented from participating in overhead traffic movements, because Tyson had expressed an intention in its application to refrain from carrying overhead traffic.[6]

Rather than consider the applications in the sequential order received, as Cheney requested in a preliminary motion, the ICC interpreted the feeder line statute to allow simultaneous consideration of the applications.[7] The

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[6]Discovery later elicited the fact that Tyson was reluctant to enter the rail business at all, and that CSXT had actually drafted Tyson's feeder line application for it. Moreover, the operations Tyson contemplated would prevent overhead movement whenever Tyson was unloading freight at its facility, as Tyson did not plan to build sidings which would clear unloading freight cars off the line and allow for passage of other traffic.

[7]Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL* (not printed), served June 2, 1987.

Commission, in discovery orders, also rejected Cheney's arguments that the anti-competitive aspects of the CSXT-Tyson arrangement should be fully explored in examining the relative merits of Tyson's limited proposal.[8] After a delay of nearly two years, the Commission approved both applications, ordering the sale of the entire line on terms and conditions which it established.[9] Most importantly, it delegated to CSXT the task of deciding which of the two applicants would be

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(App. F, 168a-175a).

[8]Finance Docket No. 31012, *Cheney Railroad Company, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL* (not printed), decisions served May 27, 1987; July 19, 1987; August 14, 1987; and December 1, 1987. (Apps. G to J, 176a-263a).

[9]*Cheney Railroad Company - Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d 251 (1989). (App. E, 61a-167a).

permitted to purchase the 1.46 miles of line both sought.[10]

As expected, CSXT chose Tyson as the purchaser of the 1.46 miles, eliminating competition for overhead traffic and thus imperiling the long term prospects for Cheney's operation of the remainder of the line. Cheney sought judicial review of the Commission's decisions by the United States Court of Appeals for the District of Columbia Circuit, asserting that, *inter alia*, the ICC had misinterpreted the feeder line statute in simultaneously considering competing applications, and that the Commission had been arbitrary and capricious in approving the Tyson application despite its anti-competitive

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[10]*Id.* at 276. (App. E, 160a).

ramifications.

Cheney's primary argument on the feeder line statute was based on the fact that elsewhere in the amended Interstate Commerce Act, in provisions enacted simultaneously with the feeder line program, Congress had expressly authorized the Commission to consider competing applications in proceedings involving the purchase of rail lines.[11] In stark contrast, the feeder line statute, which in earlier legislative drafts had contemplated consideration of multiple applications for the same line, was entirely mute on this point in its final

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[11] *See* 49 U.S.C. §§ 10905 and 11345. 49 U.S.C. Section 10905 is especially relevant because it is the post-abandonment equivalent of the feeder line statute, as interested parties can apply within a limited time period to purchase rail lines the ICC has authorized owning carriers to abandon.

version. Cheney urged, as it had before the Commission, that the comparative silence between the complementary sections of the statute established that Congress did not intend to permit the Commission to simultaneously consider competing applications for the same feeder rail line.

The court rejected Cheney's argument, taking the opportunity to hold that such a method of statutory construction - long known as *expressio unius est exclusio alterius* - was in its view illegitimate in the administrative context.[12] The court

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[12]*Cheney Railroad Co. v. ICC*, 902 F.2d 66 (D.C. Cir. 1990) (App. A, 1a-25a). The court interpreted the ancient expression to mean that ""explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context.'" Id. at 68 (quoting *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 779 (D.C. Cir. 1990)) (App. A, 10a). The court's criticism of the

read *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), as a mandate that Congressional silence on an issue can only be interpreted to mean that Congress was leaving to the agency the resolution of the issue, because under *Chevron* an agency has been delegated reasonable discretion to answer all questions that Congress has

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expressio canon was explained:

> Scholars have long savaged the *expressio* canon. Max Radin called it "one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." The Supreme Court has more charitably dubbed it "a valuable servant, but a dangerous master." Whatever its general force, we think it an especially feeble helper in the administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.

Id. at 68-69 (citations omitted) (App. A, 11a-12a).

not directly resolved.[13] The court felt that contrasting legislative silence, standing alone, "can rarely if ever be the 'direct' congressional answer required by *Chevron*."[14]

Cheney's claim regarding the anti-competitive aspects of the Tyson application was based on the Commission's obligation under 49 U.S.C. Section 10910 to examine Tyson's purchase in accordance with the public interest standard implicit in the statute's use of the phrase "public convenience and necessity."[15] Cheney

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[13]902 F.2d at 69 (App. A, 12a-13a). As precedent for this proposition, the court cited only to recent decisions of its own circuit. *See Clinchfield Coal v. FMSHRC*, 895 F.2d at 779; *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C. Cir. 1989).

[14]902 F.2d at 69 (App. A, 13a).

[15]49 U.S.C. § 10910(b)(1)(A)(i). While only the additional .15 mile segment that Tyson alone sought is subject to this standard, the parties treated the two segments Tyson sought as

argued that the Commission should have paid greater heed to the competitive ramifications of a successful Tyson application, because the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), of which the feeder line program was a part, carried a congressional instruction to the ICC that it was to administer the amended Interstate Commerce Act so as to ensure effective competition among rail carriers. This instruction is codified in the National Rail Transportation Policy, 49 U.S.C. Section 10101a.[16]

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inseparable, as the .15 mile segment would have been worthless to Tyson without the other 1.46 miles of line. 902 F.2d at 70 (App. A, 21a-22a). Cheney's argument on public interest grounds was directed at this "package" of lines Tyson sought, as it was with this package that competition for overhead traffic is prevented.

[16] *See, e.g.*, 49 U.S.C. § 10101a(1), (4) and (5).

The appeals court, however, read the feeder line statute as in part hostile, with the remainder at best silent, to the goal of maintaining effective competition, so it refused to examine the ICC's decision against the "arbitrary and capricious" standard of 5 U.S.C. Section 706(2)(A).[17] Interpreting the statute in isolation from the rest of the Interstate Commerce Act, the court did not even reach the merits of Cheney's arguments on

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[17]902 F.2d at 70 (App. A, 22a-24a). The feeder line statute prohibits the Commission from finding the public convenience and necessity permit a forced sale if such a sale would have a "significantly adverse financial effect on" or "an adverse effect on the overall operational performance of" the incumbent rail carrier operating the line. 49 U.S.C. § 10910(c)(1)(C) and (D). The court felt such requirements indicated that "competition cuts against, not for" Cheney's argument that the public interest would be better served by the competition for overhead traffic its rail service would provide, as opposed to that contemplated by Tyson's application. 902 F.2d at 70 (App. A, 23a).

competition, but rather affirmed the ICC's conclusions on grounds the Commission itself did not espouse.[18]

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO PRECEDENT OF THIS COURT AND ANOTHER CIRCUIT THE COURT BELOW HAS FOUND A TRADITIONAL TOOL OF STATUTORY CONSTRUCTION INAPPLICABLE TO ADMINISTRATIVE AGENCY STATUTORY INTERPRETATION

It is readily apparent that the court below has adopted an exceedingly deferential method of reviewing agency statutory interpretation, one at odds with existing Supreme Court precedent. In

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[18]Because the court felt that the potential for competition was irrelevant to the Commission's authority to order sales under the feeder line statute, it also avoided addressing the propriety of the ICC's decisions almost totally denying discovery by Cheney of facts it sought from CSXT and Tyson necessary to fully examine the competition issues. *See* ICC decisions cited in note 8, *supra*.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("*Chevron*"), this Court established a standard of judicial review of agency interpretation of statutes the agency has been charged with administering, by stating that:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

> permissible construction of the statute.
>
> [9]The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, *employing traditional tools of statutory construction,* ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 842-43 (emphasis added) (citations and footnotes 10 and 11 omitted). *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (regardless of agency's interpretation of statute, if court can "determine congressional intent using traditional tools of statutory construction . . . that interpretation must be given effect").

The court below has now decided that one traditional tool of statutory construction, the canon of construction known as *expressio unius est exclusio alterius,* is inapplicable to the interpretation of administrative statutes, as there almost always will be a question as to whether comparative Congressional silence connotes forbiddance or simply is an implicit delegation to the agency to decide the issue. In such instances, the reviewing court, under the regime established by the decision at issue, is to defer to the administrative agency's reasonable construction of that silence.

Such a decision, however, while invoking *Chevron*, not only contradicts the plain language of that decision, but also

Supreme Court precedent cited there, this Court's application of the principles articulated in that opinion, and a holding of the United States Court of Appeals for the Ninth Circuit. If allowed to stand, such an approach to judicial review of agency statutory interpretation has the potential to lead to a significant abdication of reviewing court authority, as it requires a precision in the communication of legislative intent that is present only in increasingly rare instances. *See* Silberman, Chevron--*The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 825 (1990).[19] The

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[19]*See also* Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 468-69 n. 67 (1989) (literal reading of *Chevron* adopts standard of statutory clarity and specificity that will be difficult for Congress to meet); Shapiro & Glicksman, *Congress, the Supreme Court, and the*

decision has added importance, for it comes from the Court of Appeals from the District of Columbia Circuit, the leading lower court for review of federal administrative agency decisions, and a court that is looked to by the other circuits for guidance in the area of administrative law and procedure.

A. Use of the *Expressio* Canon of Statutory Construction is Mandated by the Court's Decision in *Chevron*

The Court should grant this petition because neither *Chevron* nor any of its

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Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 859 (few statutes are absolutely clear); Panel Discussion, ABA Section of Administrative Law, *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353, 369 (1987) (statutory construction much more complicated than search for direct decision of precise questions) (remarks of Professor Sunstein).

progeny call for the exacting requirement of congressional specificity the court below has imposed. Some of the cases cited in *Chevron* derived legislative intent not only from the language employed by the Congress, but also from the implication of legislative silence on an issue,[20] particularly when compared with contemporaneous, related statutes.[21]

Similarly, this Court's application of the *Chevron* principles of judicial

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[20]*See, e.g., SEC v. Sloan*, 436 U.S. 103, 112-14 (1978) ("in light of explicit congressional recognition in other sections of Act both past and present" of necessary preconditions to agency's exercise of power, difficult to read silence on preconditions as nevertheless authorizing agency to exercise identical powers); *see also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36 (1981) (statute did not "by necessary implication" foreclose regulatory body's interpretation of statute).

[21]*See FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 742 (1973) (comparing unambiguous language in contemporaneous and related statutes to overturn agency interpretation of authority based on ambiguous statutory language).

review have not been as overly literal as that of the court below, as the Court consistently examines whether Congress has "directly addressed the precise question at issue" by looking at such factors as the design and structure of the entire statute, and not just the provision in question. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985). The fundamental concepts that a statute should be construed as a whole, and that the meaning of a statute can become apparent from its relationship with other laws, have thus been discarded, at least in the administrative context, by the court

below. *See United States v. Morton*, 467 U.S. 822, 828 (1984); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521.

It is well established that the most natural comparison to make, when attempting to derive the meaning of a specific statutory provision, is with similar provisions in the same statute, especially when those provisions have been enacted at the same time. *See, e.g., Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, ___, 109 S. Ct. 1814, 1818 (1989). This truism applies regardless of whether or not an administrative agency is charged with interpreting the statute in

the first instance. Thus, in *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987), the Court held that because Congress imposed a different statutory standard to determine whether an alien in this country should be granted political asylum, as opposed to the statutory standard used when deciding whether an alien should not be deported because of the potential for political persecution in her home country, the agency implementing the standards cannot construe them to mean the same thing. The Court expressly stated that "'[w]here Congress includes particular language in one statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

or exclusion.'" *Id.* at 432.[22]

Under the principle espoused by the court below, however, the Immigration and Naturalization Service would have been permitted to construe the two standards identically, as Congress' failure to communicate an express intent to prohibit such an interpretation would have been read as a delegation to the INS of the authority to interpret the statute in any way that would reach a reasonable result. The court below was of the opinion that such a degree of deference to agency interpretation was called for by *Chevron*. When advanced by the government in *Cardoza-Fonesca*, however, such reasoning

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[22]The Court directly quoted from *Russello v. United States*, 464 U.S. 16, 23 (1984), discussed in greater detail below.

was quickly dispatched by the Court as contrary to the principles established in *Chevron*. *INS v. Cardoza-Fonesca*, 480 U.S. at 445-48.

This Court's discussion of the dispositive method of statutory construction in *INS v. Cardoza-Fonesca* is also relevant because the portion of that opinion quoted succinctly describes the canon of statutory construction denigrated by the court below. In recent years this Court on numerous occasions has applied the *expressio* canon, also known as the doctrine of negative implication, to derive congressional intent.[23] In

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[23]*See generally* Note, *Intent, Clear Statements, and the Common Law Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 895-96 (1982) (detailing Court's use of *expressio unius est exclusio alterius* maxim to resolve increasingly complex statutory issues).

Russello v. United States, 464 U.S. 16, 23 (1984), quoted above in *Cardoza-Fonesca*, this Court applied the maxim to defeat a restrictive definition of a term in a criminal statute urged by the petitioner defendant, because Congress, in related sections of the same statute, evidenced an intent that when it wanted to limit the reach of the term at issue, it did so by writing the statute that way. *See also Chan v. Korean Air Lines, Ltd.*, ___ U.S ___, ___, 109 S. Ct. 1676, 1683 (1989) (art of legislative draftsmanship will become obsolete when power can be implied in silent treaty provision despite fact that such power was expressly granted in parallel provisions of same treaty). The Court below has plainly erred in reading

Chevron as hostile to use of the *expressio* canon in interpreting administrative statutes.

B. Use of the *Expressio* Tool of Construction is Particularly Appropriate in This Case

The refusal of the court below to use the *expressio* tool of construction in construing the Staggers Act amendments to the Interstate Commerce Act is especially disconcerting, given the fact that the canon is normally employed only in narrowly drawn circumstances, and this was one of those circumstances.[24] *See*

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[24]The ICC itself has used the *expressio* canon to find that the Staggers Act prohibits competing applications for lines sought to be purchased as part of what the Commission refers to as "minor" rail merger transactions under 49 U.S.C. Section 11345(d). *See Railroad Consolidation Procedures*, 366 I.C.C. 75 (1982). In Section 228 of the Staggers Act, Congress reformed the ICC approval process for rail industry mergers. 94 Stat. at 1931-34 (codified at 49 U.S.C. §§ 11344-45). In so doing, it created three different categories of

generally R. Dickerson, The Interpretation and Application of Statutes 234-35 (1975). The canon is not a principle of law, but rather an aid to statutory construction. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986). As such, it will not be applied to override strong, contrary indicia of legislative intent. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (*expressio*, like other statutory canons, subordinated to

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mergers, which the Commission has come to refer to as major, significant and minor transactions. 49 C.F.R. § 1180.2. Because Congress, in 49 U.S.C. Section 11345(b) and (c), expressly allowed third parties to file competing applications for merger approval in major and significant transactions, but did not so provide for minor transactions in Section 11345(d), the Commission presumed the omission was intentional and thus refuses to accept competing applications in minor rail merger transactions. *Railroad Consolidation Procedures*, 366 I.C.C. at 83-84 (codified at 49 C.F.R. § 1180.4(d)(4)(i)).

doctrine that courts will construe details of an act in conformity with act's dominant general purpose). Similarly, if there is another obvious explanation, besides purposeful exclusion, for the legislature's failure to supply the absent term or provision, the *expressio* canon will not apply.[25]

In addition, the two or more statutory provisions being compared must be closely related, to the extent that *in pari materia* construction is appropriate.[26] Finally, it is more

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[25]*See, e.g., Carter v. Director, Office of Workers' Compensation Programs*, 751 F.2d 1398, 1401-02 (D.C. Cir. 1985).

[26]*Compare Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983) (*expressio* canon applied to interpret contrasting chapters of Bankruptcy Act) *with United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C. Cir.) (crucial difference between Occupational Safety and Health Act and Coal Act prevents two from being reliably compared), *cert. denied*, 453 U.S. 913

probative of legislative intent that Congress at some point have considered including the absent provision, than if the failure to do so was simply because such an action did not occur to Congress. *See* Posner, *Statutory Interpretation--In the Classroom and in the Courtroom,* 50 Univ. of Chi. L. Rev. 800, 813 (1983).

All of these conditions are present in the instant case. 49 U.S.C. Sections 10905 and 10910 are ideal candidates for *in pari materia* construction. The Staggers Act, when it added the feeder line statute to the Interstate Commerce Act to provide for pre-abandonment forced sales, at the same time expanded the post-abandonment sale provision, Section 10905,

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(1981).

to provide for forced sales. Pub. L. No. 96-448 § 402, 94 Stat. at 1942-45.[27] In fact, earlier versions of the Staggers Act would have codified both pre-abandonment and post-abandonment forced sale provisions in the same section. *See* 126 Cong. Rec. H8608, H8622 (daily ed. Sept. 9, 1980). The two statutory provisions employ many of the same concepts, and the Commission has often borrowed from its Section 10905 procedures and standards to give content to Section 10910, including in the decision at issue here.[28]

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[27]49 U.S.C. Section 10905 existed prior to the enactment of the Staggers Act in 1980, but provided only for the voluntary transfer of abandoned rail lines by the owning carriers.

[28]*See, e.g., Feeder Railroad Development Program*, 367 I.C.C. 261 (1983); *Cheney Railroad Company - Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d at 268 (App. E, 129a).

A major difference, however, between Section 10905 and 10910, is that the former provision expressly contemplates that more than one application may be filed to purchase the same rail line, while the latter does not. *See* 49 U.S.C. § 10905(f)(3). That this disparate treatment on the part of Congress was intentional is supported by the legislative history. There is ample evidence that Congress at one point contemplated providing for competing applications in the pre-abandonment forced sale process, as the House version of the feeder line statute contained just such a provision. *See* 126 Cong. Rec. at H8623 (adding new Section 10911(d)(1)(C)).

In the House-Senate Conference

Committee's formulation of the final version of the feeder line statute, however, this provision was dropped. It is clear, therefore, that Congress considered the possibility of competing feeder line sales when drafting the statute, but nevertheless failed to allow for them in the enacted law, thus satisfying another of the conditions for application of the *expressio* canon.[29]

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[29]The court below paid little heed to this legislative history, relying on precedent of this Court that the ICC is not barred from exercising authority that Congress had previously extended to the Commission but had deleted upon reenactment. 902 F.2d at 69 (App. A, 14a-15a). In the case cited, however, *American Trucking Associations v. United States*, 344 U.S. 298, 309-10 and n.10 (1953), the Court was construing a statute in which it had already used legislative history to find that the deletion carried no substantive import, but was purely for purposes of clarification. *See Thomson v. United States*, 321 U.S. 19, 23 (1944). In contrast, there is no recorded explanation in the Staggers Act why the provision for competing feeder line applications was dropped.

On the whole, the court below misunderstood Cheney's use of legislative history. The deletion

Lastly, application of the *expressio* canon to prohibit ICC consideration of competing applications is not contrary to any dominant legislative intent of the feeder line statute. The ICC rationalizes its consideration of competing feeder line applications because of the need to hasten the forced sale process, a goal thought to be consistent with the feeder line program's general purpose.[30] On review,

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of the provision at issue in the Conference Committee may not by itself establish a legislative intent to prohibit ICC consideration of competing applications, but when compared with the contemporaneous amendment to 49 U.S.C. Section 10905, adding a provision for competing applications, it is clearly probative of legislative intent on the matter.

[30] 5 I.C.C.2d at 254 (App. E, 76a). The Commission's asserted policy basis for allowing competing applications - to prevent undue delay by ruling on applications individually - is itself questionable, as the instant case demonstrates. Under 49 U.S.C. Section 10910(b)(1)(A)(ii), the Commission's role is a relatively simple one, as its sole task is to determine the financial viability of the proposed new owner of the line

the court simply found the Commission to have reasonably interpreted what it thought was an ambiguous facet of the statute.[31] The court below, however, did not find the Commission's construction of the feeder line statute to be a required interpretation. Under *Chevron,* as a pure policy decision, the Commission's interpretation cannot be used to override contrary legislative intent, which in this instance is established by the negative

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sought to be purchased. This task should take no more than a few months. In fact the Commission's own regulations impose such a timetable for decisions on feeder line applications. *See* 49 C.F.R. § 1151.2. Because it accepted both the Cheney and Tyson applications for simultaneous consideration, however, it took nearly two years for the Commission to ultimately decide that both should be permitted to purchase the 1.46 miles of track at issue, far exceeding the predicted regulatory timetable and significantly delaying the eventual sale of the line.

[31] 902 F.2d at 69 (App. A, 15a-17a).

implication arising from Congress' contrasting failure to expressly provide for competing applications in the feeder line statute.

None of this mattered to the court below, however, as it sees no need to adhere to the *expressio* canon of construction, particularly in the administrative context. Such reasoning is in direct conflict with that of the United States Court of Appeals for the Ninth Circuit, which has described the canon as one of the "most basic" and has used it to interpret changes made to the Interstate Commerce Act by the Staggers Act. *See Arizona Electric Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987); *see also West Coast Truck*

Lines, Inc. v. Arcata Community Recycling Center, Inc., 846 F.2d 1239, 1244 (9th Cir.) (using *expressio* canon to derive meaning from Interstate Commerce Act sections amended by Motor Carrier Act of 1980), *cert. denied,* 488 U.S. 856 (1988). The Court should grant this petition to resolve the conflict and authoritatively rule on whether the *expressio* canon truly is one of "the traditional tools of statutory construction" referred to by the decision in *Chevron*.

C. This Case Involves Fundamental Issues of Statutory Construction Facing Both Courts and Administrative Agencies

This case presents the Court with the opportunity to further elucidate the *Chevron* principles. While it is becoming increasingly obvious that there is some

disagreement as to exactly what interpretative methods are to be recognized as "traditional tools of statutory construction" under *Chevron*, *see* Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 520-21, the long established maxims, such as the *expressio* canon, were thought to be accepted as particularly useful in ascertaining legislative intent. Just last term the Court, citing the traditional tools language, used the maxim *"noscitur a sociis"* in overturning an agency interpretation of law. *See Dole v. United Steelworkers of America*, ___ U.S. ___, ___, 110 S. Ct. 929, 934-35 (1990).

Nevertheless, the court below has now

taken upon itself the task of reopening the issue, and deciding whether or not certain canons of statutory construction should be applied in the administrative context. While criticism at times has been leveled at almost all of the traditional tools of statutory construction, including *expressio*, there are nonetheless legitimate arguments to be made on behalf of their utility. *See, e.g.*, Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 451-59 (1989) (defending use of canons, including *expressio*, to interpret administrative laws). For every "scholar" who has "savaged" the *expressio* canon of construction, others have found it helpful, including in the administrative

context. *See, e.g., The D.C. Circuit Review, Administrative Law:* Chevron *and Canons of Statutory Construction,* 58 Geo. Wash. L. Rev. 829, 839 (1990) (*expressio* canon, as statute-defining canon, clearly helpful in interpreting statutory language and determining congressional intent under *Chevron*).

This case assumes importance beyond the utility of the *expressio* canon, because the reasoning adopted by the court below is potentially applicable to many other canons of statutory construction when used in the administrative context. If lower courts begin to require legislative precision to the degree demanded by the court below, many of the "traditional tools of statutory

construction" will become useless in establishing the legislative intent behind administrative statutes. The Court should act now to resolve what is turning out to be an increasing conflict and divergence in the application of the principles enunciated in *Chevron*.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER OR NOT INDIVIDUAL PROVISIONS OF THE INTERSTATE COMMERCE ACT CAN BE READ IN ISOLATION FROM THE NATIONAL RAIL TRANSPORTATION POLICY

The court below also made a fundamental error when it refused to review the ICC's decisions regarding the anticompetitive nature of Tyson's feeder line application. Under the Interstate Commerce Act and well-established precedent, that court, in order to

determine whether or not the ICC acted arbitrarily or capriciously, should have reviewed the ICC's actions for conformity with the National Rail Transportation Policy, as codified at 49 U.S.C. Section 10101a.

One of Cheney's main arguments before the ICC was that its feeder line application should be favored over Tyson's because Cheney's operations held out the prospect that Cheney could compete with CSXT for overhead traffic. The Commission discounted this possibility, after refusing to compel as necessary discovery requests made by Cheney for information about overhead traffic specifics and anticompetitive conduct that CSXT and/or Tyson would have knowledge of. Because it

thus failed to perceive any real difference between the applications, the Commission refused to favor either applicant over the other, leaving the task to a hardly disinterested CSXT.

Cheney challenged the decisions of the Commission on competition issues as arbitrary and capricious in the court below. The court, however, rather than examine those decisions, read the feeder line statute *de novo* as in part hostile, with the remainder irrelevant, to Cheney's competition arguments.[32] It thus saw no

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[32]*See supra*, note 16. The court stated that:

> Cheney uses the anticompetitiveness line as a doctor uses the red-rubber hammer, expecting our knees to jerk. But even if it were clear that CSX put Tyson up to the deal, with the aim of reducing the risk of competition from Cheney for overhead traffic, the fact would not get Cheney where it wants to go. Section 10910 does not preclude a carrier forced to sell track it would rather abandon from using such a

reason to make that searching and careful inquiry into the basis for the Commission's decisions which is required by the Administrative Procedure Act, 5 U.S.C. Section 706(2)(A). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). In so doing, the court below interpreted the feeder line statute in isolation, ignoring nearly fifty years of Supreme Court precedent in the process.

The revised Interstate Commerce Act is not a compilation of individual

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strategem to minimize the adverse consequences.

902 F.2d at 70 (App. A, 23a-24a). Ironically, the court adopted the attitude of rail carriers which gave rise to the Interstate Commerce Act, as best expressed by William Henry Vanderbilt's exclamation, "The public [interest] be damned." The Oxford Dictionary of Quotations 551, line 12 (2d ed. 1953).

statutes, but rather is an attempt to provide a comprehensive system for economic regulation of interstate transportation. Ever since the Transportation Act of 1940, Congress has provided instruction to the ICC to guide the implementation of its mandate under the Interstate Commerce Act. These guidelines originally pertained to all transportation modes, and were designated as the National Transportation Policy. *See* Pub. L. No. 785 § 1, 54 Stat. 898, 899 (codified at 49 U.S.C. preceding § 1 and later recodified at 49 U.S.C. § 10101).

This Court quickly realized the importance of the policy factors enumerated therein. In *McLean Trucking Co. v. United States*, 321 U.S. 67, 82

(1944), the Court held that the policy "is the Commission's guide to the public interest." Later, in *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), the Court recognized that the National Transportation Policy

> is to govern the Commission in the administration and enforcement of *all* provisions of the [Interstate Commerce] Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. Of course the Commission possesses a "wide range of discretionary authority" . . . But that discretion must be exercised in conformity with the declared policies of the Congress. . . . [W]e would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.

Id. at 87-88 (emphasis added) (citations

omitted). *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 209-10 (1944).

For forty years the National Transportation Policy remained unchanged, until the Staggers Act in 1980. With that Act, Congress made two significant changes. First, it established a National Rail Transportation Policy, separate from the policy which would govern other modes. *See* Pub. L. No. 96-448 § 101, 94 Stat. at 897-98 (codified at 49 U.S.C. § 10101a). The importance of this policy was in no way diminished, however, as Congress stated that "[t]he new section [of the Interstate Commerce Act] establishes a specific rail transportation policy to guide the Commission in its duties in

regulation of the railroad industry." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 80, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4111.

The second change wrought was the new focus of the enumerated factors. Whereas the previous National Transportation Policy was completely silent on the issue of competition, the new rail policy contained a number of announcements that it was to be the policy of the government that there be "effective competition" in the rail industry. *See, e.g.*, 49 U.S.C. § 10101a(1), (4), and (5).[33] The

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[33]The policy specifically states that

> [i]n regulating the railroad industry, it is the policy of the United States Government-
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for

legislative history confirms this, noting that the goal of the new policy was to "mov[e] the industry toward more aggressive competition." H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 54, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3999.

It was against this backdrop that the feeder line statute, along with other provisions of the Staggers Act, was enacted. Since 1980, both the Commission

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transportation by rail;

* * *

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

* * *

49 U.S.C. § 10101a.

and reviewing courts have judged the Commission's rail regulatory actions against the factors enumerated by the National Rail Transportation Policy. While some Interstate Commerce Act statutory provisions expressly incorporate the factors,[34] the Commission's exercise of authority under each provision of the amended Act is to be guided by that policy, including the factors stressing the need for effective competition. *See Chesapeake and Ohio Railway Co. v. United States*, 704 F.2d 373, 375-76 (7th Cir. 1983) (setting aside as not supported by substantial evidence Commission's decision under 49 U.S.C. § 10705(e) approving rail carrier's cancellation of joint rates and

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[34]*See, e.g.*, 49 U.S.C. § 10505(a)(1).

holding that public interest in preserving competition is "explicit in the national transportation policy for railroads, 49 U.S.C. § 10101a, which is to guide the Commission in applying the rail provisions of the Interstate Commerce Act").

The court below, however, totally ignored the National Rail Transportation Policy factors in interpreting the feeder line statute. It did not attempt to reconcile the feeder line statute provisions with any of the enumerated policy factors, but instead read the statute as antithetical to, or unaffected by, Congress' concern for the maintenance and promotion of effective competition. In so doing it cast off the method of reviewing ICC action this Court, as

outlined hereinbefore, established and others have followed for nearly five decades. *See, e.g., Freight Forwarders Institute v. United States,* 409 F. Supp. 693, 706 (N.D. Ill. 1976) (remanding to ICC because National Transportation Policy must be taken into account by ICC in any action it might take). The effect of the court's action is to deprive Cheney of the benefit of full judicial review the Administrative Procedure Act promises.

Highlighting the court's error is the fact that the ICC never held that competitive concerns are irrelevant to the exercise of its feeder line authority. The court below was plainly putting an unwarranted and erroneous judicial gloss on the statute. There is no basis to hold

that the feeder line provisions of the Interstate Commerce Act can be read in isolation from the rest of the statute, which is prefaced by, *inter alia*, a concern for effective rail competition.

The most protection from the pro-competition rail policy which is afforded feeder line sellers is found in 49 U.S.C. Section 10910(c)(1), which only applies to a portion of the Tyson line but not at all to that sought by Cheney. There, it is provided that an incumbent rail carrier should only be required to sell its rail line if to do so would not result in either "a significantly adverse financial effect" or "an adverse effect on the[ir] overall operational performance." 49 U.S.C. § 10910(c)(1)(C) and (D). Plainly,

Congress, by enacting those provisions, sought to prevent use of the feeder line statute in those instances where the incumbent rail carrier would be crippled by loss of the subject line. Given Congressional concern for effective rail competition, however, those provisions cannot and should not be read, as the court below did, as a mandate for the Commission to completely protect carriers required to sell their lines under the feeder line program from any and all competition from purchasers.

Even more unsupportable is the court's determination that competition is an irrelevant consideration under the remainder of the statute, which applies to the entirety of the line sought by Cheney.

There is not an iota of evidence that Congress, when it crafted the feeder line statute, intended that the normal constraints on Commission action, the National Rail Transportation Policy factors, be removed during feeder line proceedings. The feeder line statute is no different than any other power that has been granted to the Commission.

At a minimum the court should have attempted to reconcile its interpretation of 49 U.S.C. Section 10910 with the National Rail Transportation Policy factors. Courts, when faced with seemingly conflicting statutes or provisions, have long been expected to attempt to reconcile the conflict and reach a reasoned judgment as to which to

apply, not simply apply one provision while ignoring the other. *See United States v. Morse*, 95 U.S. 760, 763 (1877). This should be particularly true in the case of the Interstate Commerce Act, given the preeminence of the National Rail Transportation Policy factors.[35]

The court below failed to review the ICC's actions against the express standard given by Congress--the National Rail Transportation Policy. Instead, the court supplied its own mistaken interpretation of the feeder line statute, which conflicts with Supreme Court precedent and precedent of other circuits. But most

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[35]Often times the policy factors themselves, because they express legislative purposes in broad generalizations, will overlap, or even conflict, in which case the Commission balances the public interests inherent in each of the factors in reaching its decision. *See ICC v. Parker*, 326 U.S. 60, 66 (1945).

grievously, the court below provided the Commission with an imprimatur of legitimacy for reading other sections of the Interstate Commerce Act as being unaffected by the express pro-competition policy of Congress in the National Rail Transportation Policy. The Court should grant this petition to make plain the fact that amendments to the Interstate Commerce Act are to be construed and implemented with regard to the guidelines established by Congress in its formulation of the National Rail Transportation Policy, just as the Act itself has been so construed and implemented since 1940.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHENEY RAILROAD COMPANY, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 9, 1990
Decided April 27, 1990

No. 89-1219

CHENEY RAILROAD COMPANY, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents

TYSON FOODS, INC.
CSX TRANSPORTATION, INC.,
Intervenors

Petition for Review of an Order
of the Interstate Commerce Commission

William P. Jackson, Jr., with whom *David C. Reeves* was on the brief, for

petitioner.

Evelyn G. Kitay, Attorney, for the Interstate Commerce Commission, with whom *Robert S. Burk*, General Counsel and *Ellen D. Hanson*, Associate General Counsel for the Interstate Commerce Commission, *James F. Rill*, Assistant Attorney General, *Catherine G. O'Sullivan* and *Marion Jetton*, Attorneys, Department of Justice, were on the brief, for respondents. *James P. Fonte*, Attorney, Department of Justice, also entered an apppearance for respondents.

John A. Menke, with whom *Fritz R. Kahn* was on the brief, for intervenor Tyson Foods, Inc.

Charles M. Rosenberger, Lawrence H. Richmond and *Peter J. Schudtz* were on the

brief, for intervenor CSX Transportation, Inc.

Before: BUCKLEY, WILLIAMS, and D. H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge:* The Interstate Commerce Commission has forced CSX Transportation, Inc. to sell its rail trackage between Greens and Ivalee, Alabama, which it had intended to abandon. The Commission's order allowed the line to be split, at CSX's option but against the wishes of petitioner Cheney Railroad Company, between the petitioner and another applicant. Cheney challenges primarily the Commission's authority to review simultaneously, and ultimately to

approve, competing purchase applications other than the one filed first (in this case, its own). We uphold the Commission's action in all respects.

* * *

Cheney Lime & Cement Company operates a plant near Graystone, Alabama, which has been served for more than 80 years by the 54.61-mile rail line running southwest to northeast between Ivalee (near Gadsden) and Greens (near Birmingham), at both of which points it connects with the rest of the CSX network. See Figure A. In 1983 CSX's predecessor issued public notice of its intention to abandon the line. See 49 U.S.C. § 10904(e)(2)(b) (1989). A limestone products factory without access to rail transportation is apparently not

good for much, and so Cheney Lime owner Alan B. Cheney formed Cheney Railroad Co. (here referred to simply as Cheney) as a vehicle to acquire the track from CSX. In the wake of unfruitful negotiations, Cheney on March 19, 1987 filed a purchase application for the entire route under 49 U.S.C. § 10910 (1988), which requires the forced sale of track designated for abandonment where "a financially responsible person" offers to buy.

Enter Tyson Foods (billed to us as the world's largest producer of poultry), which had purchased land adjacent to the northern end of the line as a site for a new feed mill. On April 20, 1987, Tyson filed its own § 10910 application pursuant to 49 CFR § 1151.2(d) (1989) (allowing for

filing of competing applications within 30 days of initial application),[1] but sought only the 1.61-mile segment adjoining the Ivalee connection. To Cheney's eye, Tyson's filing was a set-up arranged by CSX and aimed at precluding competition for "overhead" traffic, i.e., traffic neither starting nor ending along the route. Cheney argued that under § 10910 the Commission could assess applications only in the order received, and must accept the first qualifying application filed. The Commission rejected Cheney's motion, see *Cheney Railroad Co. -- Feeder Line Acquisition -- CSX Transportation,*

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[1]April 20, 1987, fell on a Monday, and Tyson's application was therefore timely under Commission rules. See 49 CFR § 1104.7(a) (1989).

Inc. Line Between Greens and Ivalee, AL, Finance Docket No. 31012 (May 28, 1987) (unpublished), and subsequently found both applicants "financially responsible." *Cheney Railroad Co. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d 250 (1989). CSX was allowed the option to take only Cheney's bid, or to divide the line between the two applicants. With the same order, the Commission denied Cheney's fallback plea for permission to construct a bypass track around Tyson's segment and an accompanying interchange with the main CSX line at Ivalee. Cheney appealed.

* * *

Cheney argues that § 10910 does not

"authorize" competing applications. Of course nothing in § 10910 the *filing* of successive applications by different parties, and if two are filed the Commission must handle them in some way. The only issue is how. Cheney asserts that Congress intended a pure system of first come, first served, and that the Commission acted unlawfully in even considering Tyson's application until it had finally disposed of (indeed, finally rejected) Cheney's. The argument first highlights § 10910's language: when track has been designated for abandonment and "*an* application to purchase such line has been filed...by *a* financially responsible person, the Commission shall require the rail carrier owning the railroad line to

sell such line to *such* financially responsible person." 49 U.S.C. § 10910(b)(1) (emphasis added). If Congress contemplated simultaneous assessment of competing applications, Cheney tells us, it would have used "any" in place of "an", "a", and "such". We are unable to find in the language even the faintest hint that Congress meant to establish some rule for the treatment of competing applications filed at about the same time; the language of § 10910 simply conditions the Commission's power to force a sale on the filing of an application by at least one financially responsible person.

Cheney next makes a structural argument. In the Staggers Act, of which § 10910 is a part, Congress addressed

another, parallel situation. In § 10905 it established procedures for forced sale where a railroad has not only designated but has applied for final Commission approval for abandonment; in that context it gave directions as to how the ICC should handle competing applications. See 49 U.S.C. § 10905(c) & (f)(3) (providing that "any person" may request forced sale, and allowing the seller to choose among those found "financially responsible"). Cheney makes a conventional claim that *expressio unius est exclusio alterius* -- "explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context." *Clinchfield Coal Co. v. FMSHRC,* 895 F.2d 773, 779 (D.C.

Cir. 1990).

Scholars have long savaged the *expressio* canon. Max Radin called it "one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." *Statutory Interpretation,* 43 Harv. L. Rev. 863, 873-74 (1930) (citation omitted). See also Reed Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES 234-35 (1975); Richard A. Posner, *Statutory Interpretation -- in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 813 (1983); cf. *State of Illinois, Dep't of Public Aid v. Schweiker,* 707 F.2d 273, 277 (7th Cir. 1983)("Not every silence is pregnant"). The Supreme Court has more charitably dubbed it "a valuable servant,

but a dangerous master." *Ford v. United States,* 273 U.S. 593, 612 (1927) (quoting *Colquhoun v. Brooks,* 21 Q.B.D. 52, 65). Whatever its general force, we think it an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved. *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 843-44 (1984). See also *Clinchfield Coal,* 895 F.2d at 779 (*expressio unius* insufficient to establish unambiguous intent under *Chevron*); *TRT Telecommunications Corp. v. FCC,* 876 F.2d 134, 146 (D.C. Cir. 1989) (same). Here the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a

decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the "direct[ ]" congressional answer required by *Chevron*. See 467 U.S. at 842-43.

Cheney thus turns to the legislative history. The House proposal, which ultimately emerged as § 10910, had contained a provision giving the ICC some specific directions on how to handle competing applications. See 126 Cong. Rec. H8622-23 (1980) (containing proposed requirement that § 10910 applicant file "notice of intent to acquire" including "a statement that other interested parties may also propose to acquire the line,"

along with mandate to Commission that it give preference to shipper applicants). This dropped out, without explanation, in the final version. Again the claim is one of contrast -- they had one solution in the draft, none in the final. Again the answer is that the purpose of the omission is clear in only one respect: Congress decided not to mandate simultaneous evaluation in § 10910 proceedings. In the absence of affirmative and significant evidence that Congress intended the omission to be read as a mandate of first-come-first-served, we find Congress not to have precluded or required any particular solution to roughly simultaneous applications for § 10910 transfers. See *American Trucking Ass'n v. United States,*

344 U.S. 298, 309-10 & n.10 (1953) (declining to read deletion of explicit extension of Commission authority as bar to exercise of such authority). Compare *Railroad Consolidation Procedures,* 366 I.C.C. 75, 83-84 (1982) (applying simple priority rule where statute imposed time constraints on proceedings and thus made multiple assessments impractical).

Of course, the Commission's choice must still be reasonable and accord with the general purposes of the statute at issue. See *Chevron,* 467 U.S. at 844. Here it chose to make simultaneous assessments of the competing applications, and to allow the selling carrier to pick among qualified applicants. As to the first, the Commission noted: "Until a

proceeding is completed, we do not know which, if any, applicant is a 'financially responsible person' and whether that applicant will actually buy the line at the price we set. Considering applications one at a time may thus delay transfer of a line. This would be contrary to the purposes of the feeder line development program, one of which is to preserve feeder lines." 5 I.C.C.2d at 254. This seems both reasonable in itself and faithful to a Staggers Act objective "to preserve [rail] service to protect existing shippers," *Simmons v. ICC,* 697 F.2d 326, 329 (D.C. Cir. 1982), all the more so in light of Commission regulations which close the window on competing applications 30 days after an initial

application is received. See 49 CFR § 1152.1(d) (1989). As this reasoning is ample, we have no need to evaluate the Commission's alternative idea -- that simultaneous assessment is *required* by the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945). We note, however, that unlike the statute at issue in *Ashbacker,* and others to which the doctrine has been extended, § 10910 does not drive the agency to a general "public interest, convenience or necessity" standard for its decisions. See *Ashbacker,* 326 U.S. at 330 n.4 (reproducing statute at issue). Where that aspiration is imposed, an agency is arguably required to adopt procedures that result in the selection of superior

candidates. See *New South Media Corp. v. FCC*, 685 F.2d 708, 715 (D.C. Cir. 1982). Section 10910's mandate to certify "a financially responsible person" carries no such message.

In its Reply Brief Cheney adds an attack on the Commission's decision to allow CSX to choose among qualified purchasers, as opposed to picking one itself. The attack comes too late. Cheney does not appear to have challenged that aspect of the decision before the Commission, see its Motion to Reject Competing Application, J.A. 162, and Petition to Reopen Decision Denying Motion to Reject Competing Application, J.A. 327, and further failed to do so in its main brief here. See *Reyes-Arias v. INS*, 866

F.2d 500, 504 n.2 (D.C. Cir. 1989).[2]

* * *

Cheney makes only two additional points that merit answer. It challenges as arbitrary the Commission's decision to deny it an interchange with CSX at Ivalee. Acknowledging that direct interchange would interfere with Tyson's loading operations, see J.A. 494, it offered to

---

[2]Nor has Cheney properly raised the argument that Tyson's 1.61-mile stretch constitutes a spur and as such is excepted from Commission authority by virtue of 49 U.S.C. § 10907(b)(1). Despite its numerous characterizations of Tyson's proposed segment before the agency as a spur or industrial siding, see Cheney Reply Brief 10 n.11, it near challenged the Commission's authority to allow the sale to Tyson on § 10907(b)(1) grounds. We cannot properly address an argument that the Commission, through no fault of its own, had no occasion to analyze. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

construct 4000 feet of new track alongside the existing line. The Commission was at least reasonable in denying this request; § 10910 seems aimed only at the transfer of existing lines, not the creation of new ones. See 5 I.C.C.2d at 263-64; H.R. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. at 124 (1980). The Commission did compel CSX to grant Cheney an interchange at Greens/Mt. Pinson -- through which all local traffic, including Cheney Lime's freight, had previously been carried --, thereby satisfying § 10910(d)'s requirement that "reasonable interchange" be afforded the purchaser. If Cheney wishes to pursue its plan for new track and an Ivalee interchange, it appears able to do so under §§ 10901 (or exemptions)

and 10742, at least if interstate transportation is at issue. The Commission reads its own order as not closing the door on that possibility, see Brief of Respondents 33-34, an understandable view in light of the apparent unfitness of the request for redress in the § 10910 context.

Cheney further contends that the Commission unlawfully found part of Tyson's acquisition to be in the public interest as defined by § 10910. A few hundred yards (.15 of a mile) of the track for which Tyson alone applied had not been identified for abandonment on CSX's route map; the Commission was thereby required under § 10910(b)(1)(A)(i) to find that portion of the forced sale to be in the

public convenience and necessity as defined in § 10910(c)(1). (It made this part of the sale contingent on CSX's choosing to sell Tyson the rest of the trackage it requested, to avoid Tyson's acquiring a worthless rump. See 5 I.C.C.2d at 278.) Decrying possible anticompetitive consequences (Tyson's acquisition would effectively thwart overhead traffic along the rest of the route), Cheney attacks the conclusion as an abuse of discretion. Cheney might have a case if the statute left "public convenience and necessity" undefined, but here in fact the statute shows that increased competition is not a goal of feeder preservation. Far from it: the Commission may require a "public

convenience" sale only where it finds that the transfer will *not* have an adverse effect on the financial or operational performance of the selling carrier, 49 U.S.C. §§ 10910(c)(1)(C) & (D), so competition cuts against, not for, the necessary finding. Of course where the entire track sought has been designated for abandonment, the adverse-effect test will be inapplicable, and any effects on competition between the seller and buyer will be irrelevant.

Cheney uses the anticompetitiveness line as a doctor uses the red-rubber hammer, expecting our knees to jerk. But even if it were clear that CSX put Tyson up to the deal, with the aim of reducing the risk of competition from Cheney for

overhead traffic, the fact would not get Cheney where it wants to go. Section 10910 does not preclude a carrier forced to sell track it would rather abandon from using such a strategem to minimize the adverse consequences. The Greens-to-Ivalee line remains in operation under the Commission's decision. Cheney Lime still has its outlet, as do all other shippers along the way. That is what the law was meant the accomplish. The petition is

Denied.

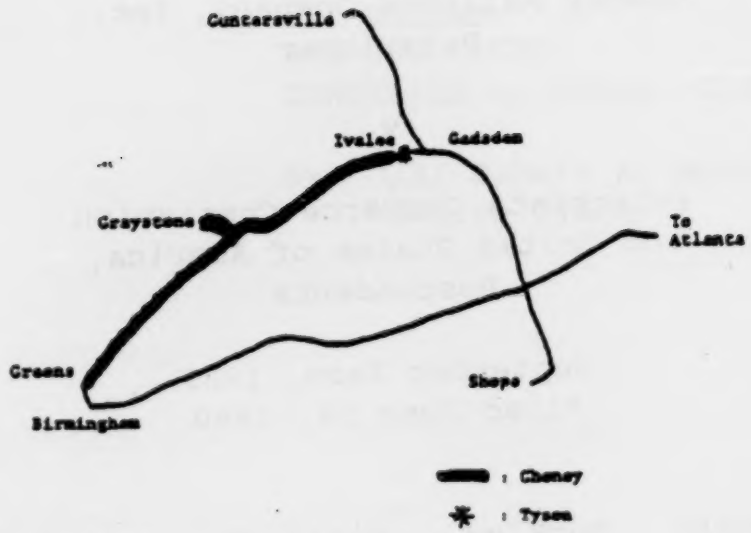
Guntersville
Ivalee
Gadsden
Graystone
To
Atlanta
Greens
Shops
Birmingham
: Cheney
: Tyson

FIGURE A

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1219

Cheney Railroad Company, Inc.,
Petitioner

v.

Interstate Commerce Commission
and United States of America,
Respondents

September Term, 1989
Filed June 28, 1990

BEFORE: Buckley, Williams and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Petitioner's petition for rehearing, filed June 11, 1990, it is

ORDERED, by the Court, that the petition is denied. A statement is attached.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /S/ Robert A. Bonner
Deputy Clerk

Cheney Railroad v. ICC, No. 89-1219

Per Curiam: In its petition for rehearing, Cheney Railroad challenges our finding that it had not properly raised before the Commission the question of whether a rail spur is subject to Commission authority under 49 U.S.C. § 10910. Pet. for Rehearing 12-13; Cheney Railroad Co. v. ICC, No. 89-1219, slip op. at 7 n.2 (D.C. Cir. Apr. 27, 1990). Cheney is correct to note that its argument before us did not depend on 49 U.S.C. § 10907(b)(1) (exempting spurs from Commission authority under §§ 10901-10906), but rather on the construction of "railroad line" as used in § 10910 itself. See Brief of Petitioner 31.

The error does not however change the result or our decision nor does it require us to address the merits of Cheney's claim. Before the Commission, Cheney did not contend that the Commission had exceeded its powers under § 10910 by authorizing the transfer to Tyson of something other than a "railroad line." Instead, Cheney's characterizations of the Tyson acquisition as "spur" or the like were for purposes of other arguments, namely, whether Tyson would be "able to assure adequate transportation" over the track, see J.A. 173, 340-41, or whether Cheney was entitled to an interchange at Ivalee. See J.A. 559, 562, 563. If an attack along the lines now suggested by Cheney can be detected at the agency

level, it was not sufficiently articulate to require answer either from the Commission or from us. Cf. City of Vernon v. FERC, 845 F.2d 1042, 1047 (D.C. Cir. 1988).

There being no merit to Cheney's other grounds for rehearing, the petition is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1219

Cheney Railroad Company, Inc.,
Petitioner

v.

Interstate Commerce Commission
and United States of America,
Respondents

September Term, 1989
Filed June 28, 1990

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing En Banc has been circulated to the full

Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS

AND REGULATIONS INVOLVED

The Administrative Procedure Act, Title 5 United States Code Section 706, provides in pertinent part that:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

The Interstate Commerce Act, Title 49 United States Code, Section 10101a, provides that:

In regulating the railroad industry, it is the policy of the United States Government --

(1) to allow, to the maximum extent possible, competition and the demand for

services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is

exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid a undue concen-

trations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

The Interstate Commerce Act, Title 49 United States Code, Section 10905, provides in pertinent part that:

* * *

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer

shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that --

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail

transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to --

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued

rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement

is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section --

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail

transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the

Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested

to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

* * *

The Interstate Commerce Act, Title 49 United States Code, Section 10910, provides in pertinent part that:

* * *

(b)(1) When the Interstate Commerce Commission finds that --

(A)(i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10904 of this title, but the rail carrier owning such line has not filed an application to abandon such line under sections 10903 and 10904 of this title

before an application to purchase such line, or any required preliminary filing with respect to such application, is filed under this section; and

(B) an application to purchase such line has been filed, in accordance with regulations required under subsection (k) of this section, by a financially responsible person,

the Commission shall require the rail carrier owning the railroad line to sell such line to such financially responsible person at a price not less than the constitutional minimum value.

(2) For purposes of this subsection, the constitutional minimum value of a particular railroad line shall be presumed to be not less than the net liquidation

value of such line or the going concern value of such line, whichever is greater, but shall not include the cost of providing a protective arrangement under subsection (j) of this section.

(c)(1) For purposes of this section, the Commission may determine that the public convenience and necessity require or permit the sale of a railroad line if the Commission determines, after a hearing on the record, that --

(A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;

(B) the transportation over such line is inadequate for the majority of

shippers who transport traffic over such line;

(C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;

(D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and

(E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

(2) In a proceeding under this subsection, the burden of proving that the public convenience and necessity require or permit the sale of a particular

railroad line is on the person filing the application to acquire such line. If the Commission finds under this subsection that the public convenience and necessity require or permit the sale of a particular railroad line, the Commission shall concurrently notify the parties of such finding and publish such finding in the Federal Register.

* * *

(k) The Commission shall, within 60 days after the effective date of the Staggers Rail Act of 1980, prescribe such regulations and procedures as may be necessary to carry out the provisions of this section.

The Interstate Commerce Act, Title 49 United States Code, Section 11345, provides in pertinent part that:

(a) If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is involved in a proposed transaction under section 11343 of this title, this section and section 11344 of this title also apply to the transaction.

* * *

(b) If the application involves the merger or control of two or more class I railroads, as defined by the Commission:

* * *

(2) The Commission shall require

that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

* * *

(c) If the application involves a transaction other than the merger or control of at least two class I railroads, as defined by the Commission, which the Commission has determined to be of regional or national transportation significance:

* * *

(2) The Commission shall require

that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 60th day after publication of notice under that subsection.

* * *

(d) For all applications under this section other than those specified in subsections (b) and (c) of this section:

(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the

Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission must conclude any evidentiary proceedings by the 105th day after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 45th day after the date on which it concludes the evidentiary proceedings.

* * *

The Interstate Commerce Commission Regulations, Title 49 Code of Federal Regulations, Part 1151 - Feeder Railroad Development Program (1989), provide in pertinent part that:

* * *

§ 1151.1 Scope.

This part governs applications filed under 49 U.S.C. 10910. The Commission can require the sale of a rail line to a financially responsible person. A rail line is eligible for a forced sale if it appears in category 1 or 2 of the owning railroad's system diagram map (but the railroad has not filed an application to

abandon the line), or the public convenience and necessity, as defined in 49 U.S.C. 10910(c)(1), permit or require the sale of the line. Until October 1, 1983, section 10910 is only applicable to lines that carried less than 3 million gross ton-miles of traffic per mile in the preceding calendar year.

§ 1151.2 Procedures.

(a) Before an application is filed, the applicant must obtain a docket number from the Office of the Secretary, Public Records Section, Rate/Finance Unit, Room B-207.

(b) The application proceeding commences on the filing of the application

with the Commission.

(c) Within 15 days of the receipt of the application, the Commission shall issue a decision rejecting the initial application if the Commission determines that the application does not substantially conform to these regulations regarding form and content.

(d) Within 30 days of the receipt of the initial application, other interested parties may file competing applications seeking to acquire all or any portion of the line sought in the initial application.

(e) At any time during the pendency of the proceeding, the Commission may issue a decision rejecting a competing application if the Commission determines

that the competing application does not substantially conform to these regulations regarding form and substance.

(f) Within 60 days of the filing of the initial application the owning railroad and other interested parties shall file their verified statements addressing the applications.

(g) Within 80 days of the filing of the initial application, applicants may file a verified reply.

(h) Within 140 days of the filing of the initial application, the Commission decision disposing of all issues shall be issued. If the Commission finds that the public convenience and necessity require or permit sale of a line, the Commission shall concurrently publish this finding in

the FEDERAL REGISTER.

(i) Within 10 days of the service date of the decision ordering the sale, the applicant(s) must file a notice with the Commission and serve a copy on the owning railroad accepting or rejecting the Commission's determination.

(j) If two or more applicants timely file notices accepting the Commission's determination, the owning railroad shall select the applicant with whom it wishes to transact business. Within 15 days of the service date of the Commission decision, the owning railroad shall file this notice with the Commission and serve a copy on the applicants.

* * *

APPENDIX E

INTERSTATE COMMERCE COMMISSION
REPORTS

Finance Docket No. 31012[1]

CHENEY RAILROAD COMPANY -
FEEDER LINE ACQUISITION -
CSX TRANSPORTATION, INC. LINE
BETWEEN GREENS AND IVALEE, AL

Decided January 23, 1989

The Commission finds both applicants under the Feeder Railroad Development Program in 49 U.S.C. §10910 to be financially responsible and able to provide adequate service. The purchase price is established at net liquidation value. CSX is directed to negotiate a sale with either: (1) Cheney Railroad Company for a 1.46-mile segment at Ivalee, AL or Tyson Foods, Inc. for a 1.61-mile segment at Ivalee; and (2) with Cheney Railroad Company for the remainder of the 54.61 miles of CSX's line between Greens and Ivalee, AL.

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[1]This decision embraces Finance Docket No. 31012 (Sub-No. 1), Tyson Foods, Inc. - Feeder Line Application - CSX Transportation, Inc. Line at Ivalee, AL.

DECISION

BY THE COMMISSION:

We have considered two applications filed under 49 U.S.C. §10910 to purchase rail lines owned by CSX Transportation, Inc. (CSX) between Greens and Ivalee, AL. On March 19, 1987, a feeder line development application was filed by Cheney Railroad Company (CRC) to purchase 54.61 miles of trackage between: (1) milepost LE 396.38 and milepost LE 445.0; (2) milepost CA 419.50 and milepost CA 421.25 (Graystone Branch); and (3) milepost LH 402.80 and milepost LH 407.04 (Self Creek Branch). On April 20, 1987, a competing application was filed by Tyson Foods, Inc. (Tyson) to purchase a 1.61-mile segment of CSX's line between

milepost LE 443.54 and milepost LE 445.15 at Ivalee.

CSX responded to both applications. Comments were also filed by Railway Labor Executives' Association (RLEA), United Transportation Union (UTU), and Brotherhood of Locomotive Engineers (BLE). Letters supporting Tyson's application were submitted by Etowah County Commission and Etowah County Industrial Development Authority. CRC filed rebuttal testimony.

Requests for procedural rulings and disputes between the parties have required that a number of decisions be issued during the development of the record in this proceeding. Chairman Gradison issued a protective order on April 19, 1987 at the request of CRC. We denied a motion by

CRC to reject Tyson's competing application on June 2, 1987. On July 10, 1987, the Chairman denied CRC's appeal of a decision of the Director of the Office of Proceedings (served May 27) granting some of CRC's requests for discovery but denying others. Chairman Gradison on December 1, 1987 denied a separate appeal by CRC of a second Director decision (served August 14) resolving other discovery issues.

The procedures for handling these applications are set out in 49 C.F.R. Part 1151, *Feeder Railroad Development Program*. The program provides shipper groups and communities with an alternative to inadequate rail service or abandonment and gives them an opportunity to preserve

feeder lines prior to their abandonment or possible downgrading. To accomplish this, the statute authorizes us to require railroads to sell certain rail lines under specific circumstances to financially responsible applicants.

The statute and regulations require that we first determine whether the line is eligible for forced sale. Under 49 U.S.C. §10910(b)(1) and 49 C.F.R. §1151.1, a line is eligible if: (1) it appears in category 1 or 2 of the owning carrier's system diagram map (but the railroad has not filed an application to abandon the line); or (2) the public convenience and necessity as defined in 49 U.S.C. §10910(c)(1) permit or require sale of the line. Except for the .15-mile segment

between milepost LE 445.0 and milepost LE 445.15, the remainder of the line here is eligible for forced sale under (1) above, for it has been on CSX's system diagram map in category 1 since March 1986. We also find below that the public convenience and necessity permit Tyson to acquire the .15-mile segment at Ivalee under (2) above.

We must also determine the financial responsibility of the offerors. Each applicant must establish that it is capable of paying the constitutional minimum value of the line and is able to assure that adequate service will be provided for at least three years. We find both offerors to be financially

responsible and able to provide rail service for such a term.

We then must establish a purchase price for the line. The statute provides that a purchase price be not less than the constitutional minimum value. This is defined as being not less than the net liquidation value (NLV) or going concern value of the line, whichever is higher. 49 U.S.C. §10910(b)(2). Here the parties agree that the purchase price should be set at the NLV. We will set the purchase price at the NLV, which we have determined to be $1,803,530 for the entire line. For the 1.46-mile segment at Ivalee (between milepost LE 443.54 and milepost LE

445.00), the NLV is found to be $55,671.[2] For the line excluding the 1.46-mile segment, the purchase price (NLV) is $1,747,859.

We have also considered requests by CRC for trackage rights over CSX to effect interchange and for the establishment of joint rates. As we discuss further below, we will require interchange and trackage rights under certain circumstances.

If the terms and conditions we establish here are accepted by CRC and Tyson, CSX must select either CRC or Tyson as the party with whom it will transact business for sale of the respective

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[2]As will be discussed below, we are unable to establish an NLV for the .15-mile segment between mileposts LE 445.0 and LE 445.15 because no evidence was submitted for that segment.

segments at Ivalee and must negotiate with CRC for the remainder of the line.

PRELIMINARY MATTERS

Before considering the applications and supporting evidence, we will dispose of several preliminary matters.

1. *Petition to reopen.* On April 19, 1987, CRC moved that the Commission reject Tyson's competing application. It claimed that Tyson's application is legally improper because §10910 does not specifically provide for competing applications. It argued further that Tyson's application was defective on the grounds that it had not demonstrated it was financially responsible under §10910(c)(1) by showing that it will serve

the public or operate the line for at least three years. Finally, CRC claimed that Tyson had not satisfied other formal requirements in 49 C.F.R. Part 1151.

Our decision served June 2, 1987, denied CRC's motion. As we noted there, our regulations at 49 C.F.R. Part 1151 specifically allow the filing of competing applications. We also rejected CRC's claim that we lack statutory authority to permit competing applications; we pointed out that §10910 does not prohibit them, and that our authority to consider them can properly be inferred from the statute and legislative history. We also noted that we had historically considered competing applications where they have involved overlapping rights, citing

Ashbacker Radio Co. v. I.C.C., 326 U.S. 327 (1945) (*Ashbacker*) and *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 520 (1946). Finally, we rejected CRC's claim that Tyson's application is defective. The application was found complete and in accord with formal requirements of Part 1151.

CRC has petitioned to reopen the June 2 decision, contending that our failure to reject Tyson's application was constitutional material error. CRC claims we improperly inferred our authority to accept competing applications from the legislative history. In CRC's view, §10910 does not refer to multiple applications, but only to sale of property to a single qualified applicant. If

competing applications were authorized, CRC asserts, the statute would have so specified as in other sections of the Interstate Commerce Act.[3] CRC also disputes our interpretation of the legislative history of §10910, because a provision permitting competing applications was deleted from the final version of §10910 by the Conference Committee without explanation. *See* H. R. Rep. No. 96-1430, 96th Cong. 2d Sess. 124-125 (1980). It challenges our interpretation that deletion of this provision does not mean that Congress intended to preclude the Commission from

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[3]*See, e.g.*, 49 U.S.C. §10905(f)(3) (multiple offers of financial assistance) and 49 U.S.C. §11344 and 11345 (permitting inconsistent applications).

allowing the filing of competing application.

CRC also considers as irrelevant the fact that our feeder line regulations (in Part 1151) permit competing applications since the statute does not explicitly do so. Next CRC contends that our reliance on *Ashbacker, supra,* is misplaced. *Ashbacker, supra,* calls for procedural fairness in dealing with competing applications authorized by statute. CRC believes *Ashbacker, supra,* is irrelevant here because competing applications are not expressly authorized by statute.

Finally, CRC asserts that we erred in finding that Tyson's application shows it to be financially responsible. It claims that Tyson has not shown that it would

operate the line at Ivalee for three years. Instead, CRC states, Tyson shows that it would operate the line only when its feed mill is in operation. This, allegedly, does not satisfy the requirements of §10910.

Tyson has responded. It argues that, while §10910 does not specifically provide for competing applications, the Commission properly followed the *Ashbacker, supra,* doctrine in considering them. Responding to CRC's claim that the application is defective, Tyson states that it is investing $5 million to build the plant and would not shut it down before it has functioned for at least three years.

We deny CRC's motion to reopen the June 2 decision. CRC raises no issues

that were not considered in that decision. As we indicated there, the statute and legislative history do not prohibit the consideration of competing applications. Rather, such authority can properly be inferred. CRC claims that §10910(b)(1) requires the Commission to order sale to "such financially responsible person" as files a proper application, and that since only one person can buy a particular line, acceptance of two applications would force the Commission into the absurd position of ordering the sale of one line to two different persons. However, the language cited does not explicitly bar simultaneous consideration of more than one application. Until a proceeding is completed, we do not know which, if any,

applicant is a "financially responsible person" and whether that applicant will actually buy the line at the price we set. Considering applications one at a time may thus delay transfer of a line. This would be contrary to the purposes of the feeder line development program, one of which is to preserve feeder lines. Thus, a more reasonable interpretation of the cited language is the one that we have taken, *i.e.*, we will consider competing applicant and require the railroad to sell to any one of the qualified applicants (as we do in §10905 forced sales).

Moreover, we have historically considered competing applications where overlapping rights are involved. Contrary to CRC's claims, *Ashbacker, supra,*

supports our decision to consider competing applications here. In *Ashbacker, supra,* the agency had to compare two competing applications because there can only be one station per radio operating frequency. In §10910 cases, only one feeder line applicant can acquire the property in question. In short, here, as in *Ashbacker, supra,* the granting of one application will affect the opportunities of the second applicant. Therefore, the *Ashbacker, supra,* doctrine applies. *Feeder Line Development Program,* 367 I.C.C. 261, 266-7 (1983) *(Feeder). See also Indiana Hi-Rail Corp.-Feeder Line Acq.,* 366 I.C.C. 42, 50 (1981).

CRC has misinterpreted our June 2 decision by claiming that we there found

Tyson to be financially responsible. Our decision determined only that Tyson's application was complete and satisfied the formal requirements of the regulations in Part 1151. CRC's assertion that Tyson's application failed to demonstrate that it will operate the line for three years involves the merits of the application and will be considered in this decision.

We have reviewed the respective merits of CRC's and Tyson's applications and find both qualified. The applications are competitive only at Ivalee. If CRC and Tyson both agree to the terms we will impose, CSX will be required to select whether it will sell either the 1.46-mile segment between milepost LE 443.54 and milepost LE 445.00 to CRC or the 1.61-mile

segment between milepost LE 443.54 and milepost LE 445.15 to Tyson.[4]

II. *Waiver request.* CRC has requested waiver of 49 C.F.R. §§1104.2(a) and 12(a) and 1151.5(b) to permit the filing of 28 valuation maps and nearly 900 pages of deeds submitted to support its calculation of constitutional minimum value of the line.

Section 1104.2(a) limits the size of filings to 8 1/2 by 11 inches. The valuation maps measure 2 feet by 5 feet, and the deeds measure 8 1/2 by 14 inches. CRC claims that, if reduced to meet the

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[4]While technically the two applications only overlap each other for the 1.46 miles at Ivalee, we recognize that, in reality, the decision for CSX is whether to select Tyson to acquire the 1.61 miles. The .15-mile portion cannot be severed from the 1.46 miles and operated separately.

size limits, the maps and deeds would be illegible.

Section 1104.12(a) requires a copy of all documents filed to be served on all parties. Section 1151.5(b) requires the filing of an original and 10 copies of documents with the Commission. CRC claims that a copy of each set of valuation maps and deeds costs $250. To supply the service list and copies to the Commission would cost more than $4,000. To avoid the cost, CRC requests that it be permitted to submit two sets of deeds to the Commission and that it need only serve copies on CSX and Tyson. It will provide additional copies upon requests.

Since no objection has been submitted and the requests are reasonable in the

circumstances, we will grant CRC's requested waiver.

3. *Request for oral hearing.* CRC requests that the proceeding be assigned for oral hearing. It complains that it has not been permitted discovery to obtain evidence on overhead traffic and CSX's dealings with Tyson, and that these allegedly erroneous rulings can only be remedied by oral hearing.

Specifically, CRC claims that: (1) it needs overhead traffic data to determine if the line meets the light traffic density threshold of §10910(f) for joint rate requests;[5] (2) overhead traffic data is also needed for a

[5]Under §10910(f), if a line carries less than three million gross ton miles of traffic per mile (GTM/M), and if requested by the purchasing carrier, the Commission must require the establishment of reasonable joint rates.

determination of CRC's financial responsibility under §10910(a); and (3) evidence should be produced about possible anticompetitive dealings between Tyson and CSX. Tyson and CSX both replied in opposition.

CRC has already conducted extensive discovery and has not shown good reason why, given this late stage in the proceeding and the lengthy record development that has already occurred, additional discovery by means of an oral hearing is necessary. The decisions served in this proceeding on May 27, July 10, August 14 and December 1, 1987, as we noted above, rejected CRC discovery requests to obtain information about overhead traffic and about the alleged

collaboration between CSX and Tyson (to prevent CRC from serving the plant at Ivalee, and thereby, competing with CSX). The requested information was determined to be irrelevant to CRC's application.

CRC's request for oral hearing merely reiterates arguments that were rejected in the discovery decisions. We agree with the discussion in those decisions. No additional or new justification for oral hearing is shown here. Our discussion below shows that the record here is adequate to resolve all relevant issues. Accordingly, we reject CRC's request for oral hearing.

4. *Motion to strike.* CSX moves to strike certain testimony and argument contained in CRC's rebuttal that was filed

December 31, 1987. We will deny the motion to strike; however, where appropriate, we will consider CSX's assertions in according appropriate weight to challenged testimony.

First, CSX moves to strike the entire verified statement of Mr. Gerald W. Fauth, Jr., and Appendix GWF-3 to Mr. Fauth's statement. Mr. Fauth's statement reviews an appraisal report prepared for CSX by Mr. T. Julian Skinner, III, and adjusts values used by Mr. Skinner to determine fair market value. Appendix GWF-3 is a list of easements and other encumbrances on the right-of-way (*i.e.*, power lines, water pipelines, public and private crossings, fences, telephone lines, cable lines, sewers, drainage ditches,

sidetracks, etc.). CSX claims that Mr. Fauth is an economic consultant, not a real estate appraiser, and is not qualified to value the real estate on its line.

CRC responds that Mr. Fauth did not appraise the property, but rather criticized the methodology used by Mr. Skinner, pointed out inconsistencies, and adjusted values of individual parcels. CRC also submits a verified statement from Mr. Fauth describing his qualifications and experience as an appraiser of railroad property. These qualifications, CRC contends, enable Mr. Fauth to criticize Mr. Skinner's appraisal.

We find that Mr. Fauth is qualified to criticize Mr. Skinner's appraisal

methodology and adjust the valuation of individual parcels. Moreover, as we discuss further, *infra*, Mr. Fauth's adjustments to Mr. Skinner's appraisal are valid and are reflected in the NLV we have determined for the line.

CSX also challenges a portion of the verified statement of Robert P. Pruett, submitted as Appendix XIII to CRC's rebuttal, beginning with the first complete paragraph on page 25 and continuing to the middle of page 26. This testimony discusses the possible use of the line to handle overhead traffic and compares it with CSX routes. CSX claims that CRC may not introduce evidence on handling overhead traffic in rebuttal testimony since the application indicated

CRC would handle only local traffic. This portion of Mr. Pruett's statement is speculative in that CRC has only suggested it could handle overhead traffic. We will treat it accordingly.

CSX also objects to Mr. Pruett's testimony in the full paragraph on page 22 that the normal through trains moving on the line in 1986 were 80 cars long, of which half were loaded and half empty. CSX claims that Mr. Pruett does not explain the basis for the 80-car estimate. It believes the estimate was contrived to be used in computing the GTM/M for traffic handled on the line in 1986 for purposes of determining the traffic density threshold under §10910(f). CSX argues that this portion of Mr. Pruett's

testimony is self-serving speculation and should be stricken.

In a related objection, CSX claims that a portion of the verified statement of Mr. Fauth in Appendix XVII of CRC's rebuttal from the second complete paragraph on page 4 to the end of the statement and Appendix GWF III-2 should be stricken. This portion of the statement attempts to restate the GTM/M for traffic handled on the line in 1986. Mr. Fauth uses Mr. Pruett's estimate of 80 cars per train to compute this figure. CSX objects that Mr. Pruett's estimate is unreliable and cannot be used as a basis for GTM/M.

We agree with CSX that Mr. Fauth's calculation of GTM/M in Appendix GWF III to his statement is defective. Mr. Fauth

used Mr. Pruett's estimate of overhead traffic to arrive at the traffic density. Chairman Gradison's decision served July 10, 1987, rejected CRC's argument that it needed overhead traffic data in order to prove under §10910(f) that the line carried less than three million GTM/M of traffic for the line to be acquired. Moreover, the statute specifically looks at traffic in the preceeding calendar year, and the line had carried only local traffic during that period.[6]

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[6]The intense dispute regarding use of overhead traffic data is unwarranted, and we fail to see why CRC has pressed the issue. The three million GTM/M standard in §10910(a)(2) is a maximum, not a minimum standard. Moreover, as discussed *infra*, reliance on such a specific degree of detail regarding potential traffic is unnecessary in the case to conclude that the CRC meets the subsection (a)(1) test. We do not see what other relevance the issue has in this proceeding.

Accordingly, and with no prejudice to CRC, we will (for reasons explained in the prior decisions and discussed infra) exclude the overhead traffic estimate from Mr. Fauth's calculations and use the local traffic data that he obtained from CSX. According to that data, in 1986 a total of 107 cars were originated and terminated on the line: 15 cars were moved between Greens and Oneonta; and 92 cars were moved between Greens and Graystone. Using the local traffic data reflected in Mr. Fauth's statement, we have recalculated the traffic density of the line in 1986 to be 11,087 annual GTM/M for 1986.

We see no need to strike Mr. Fauth's or Mr. Pruett's testimony from the record. In recalculating traffic density, we will

use those portions which are appropriate to this proceeding, and we will discuss these data below in connection with our finding under §10910(f).

Finally, CSX asserts that a portion of pages 42-43 of CRC's rebuttal argument plus Appendix IX to the rebuttal are irrelevant and should be stricken. These items refer to a State court proceeding, *North Carolina v. Seaboard System Railroad, Inc. and Grant L. Sagraves,* No. 85 CVS 6185 (Superior Court, Wake County, NC) (*Sagraves*), to support CRC's claim that CSX does not have marketable title.[7] At issue in that proceeding was the extent of CSX's interest in an abandoned right-

[7]Appendix IV contains the complaint, consent judgment, and settlement arrangement from *Sagraves*.

of-way sold to a third party under a quit-claim deed.

We agree with CSX that the consent judgment in Sagraves, while settling the property dispute in that proceeding, is not directly relevant to the issue of CSX's interest in the right-of-way here since it pertains to a segment of right-of-way that is not at issue in this proceeding. Nevertheless, we deny the motion to strike this material. While Sagraves may be entitled to little weight, it can properly be cited as support for CRC's arguments.

STATUTORY ANALYSIS OF THE CRC AND TYSON APPLICATIONS

1. *The CRC Application.* CRC was incorporated in 1984 to acquire the

Greens-Ivalee line and to operate it as a railroad. Its president and sole stockholder is Alan B. Cheney, Sr., who is also sole stockholder of Cheney Lime & Cement Company (Cheney), the principal shipper on the line. Cheney is located on the Graystone Branch, a 1.75-mile segment which connects to the Greens-Ivalee line at Mattawanna.

At the time CRC was formed, the line was operated by CSX's predecessor, Seaboard System Railroad, Inc. (SSR). SSR filed an application to abandon the line on September 19, 1984. CRC claims that it was originally incorporated to acquire the line under the financial assistance procedures in 49 U.S.C. 10905. However, SSR withdrew the abandonment application,

and the abandonment proceeding was dismissed.[8] CRC claims that SSR withdrew its abandonment application when the Commission revoked a waiver previously granted which allowed it to exclude overhead traffic data from its application.[9]

CRC states it continued negotiations with SSR and CSX to acquire the line, but that the parties were unable to agree on the value of the line. According to CRC,

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[8]Docket No. AB-55 (Sub-No. 119), *Seaboard System R. Co. - Abandonment- In Jefferson, Blount and Etowah Counties, AL* (not printed), served January 3, 1985.

[9]We also dismissed a complaint by Cheney alleging that SSR unlawful abandoned track at Remlap served from the Greens-Ivalee line, finding that the track was an exempt spur. Docket No. 40037, *Cheney Lime & Cement Co. v. Seaboard System R. Co.* (not printed), served February 10, 1987, and December 7, 1987 (denying petition to reopen), pending review *sub nom. Alabama Public Service Commission v. United States and Interstate Commerce Commission,* USCA D.C. Cir. No. 88-1024.

CSX also refused to convey the property other than be quit-claim deed, which does not assure that CSX held fee title to the property. CRC believes that the line is burdened by utility easements, including one granted in 1936 to the City of Birmingham, AL by CSX's predecessor, the Louisville and Nashville Railroad Company (L&N), for a 60-inch water pipeline. In addition, CRC argues that CSX holds most of the right-of-way by easement rather than fee simple title. It claims that the less than full title plus easements burdening it substantially diminish the value of the property interest. These issues will be discussed *infra* when we set the NLV of the line.

CRC presented a detailed operating plan for the line. Most of CRC's projected traffic will be generated by Cheney.

Cheney produces quicklime, hydrated lime in bags and bulk, and limestone. Quicklime is shipped from Landmark, AL to Graystone for storage, processing or resale. Cheney states that the market for lime is increasing because it is used in asphalt. With reliable rail service available through CRC, Cheney expects to build a large lime hydration plant at Graystone and increase production of this product. Cheney anticipates receiving 400 carloads of quicklime and shipping 126 40-ton carloads of hydrated lime in bags and

up to 20 covered-hopper carloads of lime in bulk annually.

Cheney generated 336 carloads in 1982, but it only originated 28 carloads and received 65 carloads in 1986.[10] The decline in traffic is attributed by CRC to rail service problems. In late 1986, a portion of the line was put out of service by the Federal Railroad Administration. In addition, traffic of Cheney and other shippers on the line was diverted to trucks. With the anticipated operation of the line by CRC, Cheney expects to move substantially all of its traffic by rail. Ultimately, Cheney projects it could ship 1,000 carloads of limestone annually from Graystone.

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[10] *See* Fauth Rebuttal Statement Appendix GWF-III-1.

Cheney believes that CRC's service will also attract business from other shippers on the line. At present, the line serves Empire Gas (Empire), which receives LP Gas at Oneonta, AL and McPherson Oil (McPherson), which receives and ships petroleum products at Oneonta. In 1986, Empire received 4 carloads and McPherson received 10 carloads. Accordingly to Cheney, both shippers diverted traffic to trucks because rail service was inadequate. It believes these shippers will substantially increase rail shipment using CRC.

Cheney also claims that the line will attract new business. For example, it projects that the line will handle coal shipments for Berry Mountain Mining

Company at Oneonta. At present, coal mining in the area is well below capacity, and the coal market is depressed. However, with extensive and coordinated marketing, and reliable rail service, Cheney believes coal traffic of 800 carloads per year could be developed. It has also been approached by a local coal company about developing a coal loading facility at Oneonta to handle two to four 50-car unit trains. Other examples of prospective traffic offered are pulpwood, lumber and grain.

CRC's traffic projections are based on a computer program that makes certain assumptions. For new traffic, the first year carloadings are assumed to be 10. For established traffic, current traffic

levels or levels believed to be immediately available are used. The program assumed a steady growth over a five year period. Traffic levels projected for year 5 were based on discussions with prospective shippers.

Projected revenues in CRC's operating plan are based on a per-car charge for handling shipments. CRC proposes to be compensated at $150 per car for carloads of sand, gravel, pulpwood and woodchips. For coal, it would be compensated $125 per car. For all other traffic, (i.e., lime, petroleum products, LP Gas), CRC would receive $200 per car.

CRC plans to operate the line on a daily basis, if requested, and states that it would offer service to all sidings.

Traffic would be interchanged with CSX at Ivalee at the northern end of the line (at milepost LE 445.2) and at the southern end at Mt. Pinson (at milepost LE 399.2). CRC has also requested trackage rights between milepost LE 445.0 and milepost LE 445.2 at Ivalee to create another interchange point. In exchange, CRC would grant CSX trackage rights between milepost LE 396.38 and milepost 399.2 at Mt. Pinson. CRC proposes to maintain $5 million in liability insurance for accident protection on the interchange track.

The traffic currently handled on the line moves through the southern end at Greens. No local traffic has been generated between Oneonta and Ivalee for

at least two years.[11] Under its operating plan, CRC would continue to move traffic to Cheney, Empire and McPherson via the Mt. Pinson interchange. CRC wants to interchange traffic at Ivalee to handle movements of coal and oil from Oneonta. Interchange at Ivalee in CRC's view would also facilitate routing of traffic to Gadsden. Maintaining interchanges at both ends of the line would enable CRC to compete for overhead traffic. With interchanges at both ends of the line, CRC believes it could offer its line as an

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[11]On May 27, 1987, CSX filed a notice of exemption under 49 C.F.R. Part 1152 Subpart F, *Exempt Abandonments* to abandon a 21.84-mile segment of this line between milepost LE 421.7 and milepost LE 443.54 at Ivalee. Publication was stayed pending completion of this feeder line proceeding. Docket No. AB-55 (Sub No. 201X), *SX Transportation, Inc. - Abandonment in Blount and Etowah Counties, AL* (not printed), served June 24, 1987.

alternative-single-line route between Birmingham and Gadsden.

CRC's operating plan was developed before Tyson decided to locate at Ivalee, so Tyson's traffic is not reflected in projections. However, CRC's rebuttal statement indicates it could provide service to Tyson's mill. Cheney has held several discussions with Tyson officials since August 1986, during Tyson's selection of a site for its feed mill (which would have a maximum capacity of 11,000-12,000 tons of product weekly). Tyson would receive principally feed ingredients in 95-ton covered hopper cars in 65-car units. The remaining shipments would be received as multicar movements of three or 15 cars, or single cars. CRC

believes it could serve Tyson from the south and interchange cars with CSX at Mt. Pinson. The first year of operation CRC projects it could handle 3,500 cars for Tyson. At a projected compensation of $175 per car, CRC anticipates additional revenue of $612,500. CRC also proposes to construct about 4,000 feet of track at Ivalee so it could operate its interchange without interfering with Tyson's plant.

Alan B. Cheney, president of Cheney and CRC, testifies that he will assure that adequate funds are available to consummate the transaction and operate the line. Even if no revenues are generated from rail operations, Mr. Cheney guarantees that CRC will have adequate resources to fund operations. Financial

statements submitted under seal (as attachments three and four to the application) indicate that Mr. Cheney has adequate personal and business resources and lines of credit to fund the transaction and operation. Finally, under §10910(g), CRC requests exemption from all provisions of Title 49 of the United States Code, except for the joint rate provisions of Chapter 107.

Responding to CRC's application, CSX asserts that CRC does not substantiate its traffic projections. It notes that CRC projects a five-fold increase in the freight revenues, yet it presents no real evidence to substantiate where the additional traffic will come from. The only mention of future projected traffic

is pulpwood and coal, but no evidence is presented to support traffic prospects. Without additional traffic, CSX notes, CRC will continue to suffer extensive losses. Thus, CSX argues that CRC has not established that the line will be viable for the required three year period.

CSX states it will agree to establishing an interchange with CRC at Mt. Pinson and be granted trackage rights between milepost LE 396.38 and LE milepost 399.2. It sees no operating reason to establishing an interchange at Ivalee, however. It believes that an interchange at Ivalee would not attract overhead traffic to CRC because CSX handles this traffic more efficiently via Wellington. Also, all local traffic presently is

handled through Birmingham, south of the line. Even traffic moving via Gadsden, north of the line, is routed via Wellington and Birmingham. CSX reiterates that an interchange at Ivalee would interfere with the proposed operations at Tyson's feed mill.

If CSX chooses CRC's application over that of Tyson, it could perform overhead service. The route is circuitous, however, and for that reason CSX no longer routes through traffic over that line. Moreover, if CSX chooses Tyson's application at Ivalee over CRC's, CRC would be unable to provide overhead service because, as noted below, we are denying CRC's request for an interchange with CSX at Ivalee. Since CSX may choose

Tyson's rather than CRC's application, this would as a practical matter preclude CRC from providing competitive overhead service (even if CSX's claim that its overhead route is more efficient is discounted) as it would involve another interchange (i.e., with Tyson).[12]

We find that CRC is a financially responsible entity within the meaning of §10910. Financial data clearly show that Mr. Cheney has ample resources to purchase the line and finance operations. He has guaranteed the financial obligations of CRC.

While CRC evidently is actively seeking to bring new industry to the area,

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[12]*See* discussion, *infra*, of CRC's proposal to construct a line around Tyson and thus maintain a single-line route.

we agree with CSX that the traffic projections in CRC's operating plans are not well substantiated. No evidence is submitted from those shippers who are claimed by CRC to be the source of new or increased traffic. Instead, the traffic projections are simply suggested by Cheney officials. Accordingly, CRC's traffic projections may be unreliable. However, it is clear that CRC will carry Cheney's traffic, and CRC's operations will be subsidized by Mr. Cheney and Cheney resources, if necessary. Such a subsidy, if required, will assure that CRC will be capable of carrying out its operating plan. Thus, notwithstanding defects in the record regarding the extent of non-Cheney traffic, we find that Cheney is

financially responsible to operate the line for at least three years.

We will approve CRC's request for the establishment of an interchange with CSX at Mt. Pinson and the related trackage rights request at that location. CSX has agreed to establish that interchange.

We will not grant CRC's request for an interchange at Ivalee. Both Tyson and CSX have objected that the interchange would be disruptive to Tyson's proposed feed mill. The interchange at Mt. Pinson is an efficient one and will allow CRC to interchange all the traffic on the line. CRC seeks interchange at Ivalee primarily (if not solely) to provide service to Tyson's plant. Tyson has made it clear, however, that it does not want CRC to have

trackage rights at Ivalee or an interchange with CSX there because it is not interested in tendering CRC its business.

CRC does not really dispute opponents' contention that its proposed interchange with CSX at Ivalee would interfere with Tyson's proposed operations. Rather, CRC proposes to construct 4,000 feet of track at Ivalee to link up with the CSX and avoid interference with Tyson. However, requiring that CSX make available part of a right-of-way for new construction by an applicant under §10910 is beyond the scope of our authority under §10910. The legislation is intended to facilitate the transfer of existing lines; nothing in the

language of the statute or the legislative history speaks to the creation of new ones. Moreover, Tyson objects to CRC's proposal, and we see no support in the record to require Tyson or CSX to permit CRC to construct a rail line at Ivalee. If CRC acquires the line, it could seek our approval for new construction under §10901(d) (or exemption). However, CRC has made no showing to justify the grant of such authority to date, and we do not know yet if CRC will ultimately acquire the line. For these reasons, we will not require CSX to make available any part of the right-of-way for new construction at this time.

2. The Tyson Application. Tyson is seeking to acquire the 1.61-mile segment

of the CSX line at Ivalee, AL. Tyson is a Delaware company that processes poultry. It is presently building a feed mill at Ivalee and proposes to use the 1.61-mile line to serve that plant.

CSX and Tyson have reached agreement to sell the 1.61-mile segment for $36,374. Tyson states that it has ample financial resources to purchase and operate the line. It intends to start operating when its mill begins operation and will continue to operate the line as long as the mill operates.

Tyson notes that the .15-mile segment between milepost LE 445.00 and milepost LE 445.15 is not shown on CSX's system diagram map in category one or two. Nevertheless, it asserts that no shippers

are located on that segment, and that the public convenience and necessity permit it to acquire the segment for its feed mill operation.

To operate the line, Tyson intends to use a light switch engine or trackmobile to pull covered hopper cars loaded with grain and feed ingredients over unloading pits where the cargo would be discharged. Inbound grain will be delivered by CSX at Ivalee in 65-car, 15-car and three car units; inbound feed ingredients would be received in single-car-units. It proposes to interchange cars with CSX between milepost LE 445.15 and LE 444.53.

Loaded cars would be delivered by CSX at interchange tracks and then pulled to unloading pits at milepost LE 444.36 where

the cars would be unloaded. Empty cars will be pushed east and placed on interchange tracks. CSX will return with loaded cars and, using support tracks east of milepost LE 444.15, run empties from interchange track around loaded cars and place loaded cars on interchange track.

Tyson carries $2 million basic and $48 million umbrella liability insurance to cover all operations. It also proposes to be exempt from Title 49 U.S.C. (except for the joint rate provisions of Chapter 107). Tyson does not envision that other shippers would locate on the subject trackage. However, it would provide local service to any shipper that located there if such a shipper would build an adequate siding.

Tyson states it would not need trackage rights over CSX east of milepost LE 445.15. As noted above, it opposes any other carrier operating over the trackage between milepost LE 445.15 and milepost LE 443.54, on the grounds that those operations would disrupt service at its mill.

CSX supports Tyson's application. As indicated above, it has already agreed to sell the trackage and plant site to Tyson. The new mill will be a major distribution point for other outlets in northeast Alabama. CSX envisions that Tyson will generate thousands of carloads annually, and that is why it spent 10 months encouraging Tyson to select a site on CSX for its mill.

CRC opposes Tyson's application, claiming that Tyson's operating plan is unworkable. CRC contends that the segment that Tyson would acquire has no sidings or other ancillary tracks, so a lightweight switch engine cannot be moved around a group of empty cars and be coupled with loaded cars. Also, it argues that a lightweight switch engine would not be capable of moving more than a few heavily loaded cars up a 1% grade to the car unloading pit. CRC discounts Tyson's suggestion that a trackmobile could be used, pointing out that a trackmobile could not haul heavily loaded cars up a 1% grade. Furthermore, a trackmobile requires constant maintenance and repair and may not be suitable to serve the new

feed mill, where a constant flow of raw material is needed and heavy use would be expected.

CRC claims further that Tyson's proposal does not assure adequate service for three years. Instead, CRC asserts, Tyson would start operation when its mill begins operation, would operate the line only in conjunction with the mill, and would cease operations if the mill ceases operation. Nor does Tyson's operating plan expressly contemplate service to other shippers besides Tyson. CRC also points out that, if the mill shuts down, shippers on the line would not receive service. Also, the line would be blocked when Tyson unloads cars.

CRC argues further that Tyson's application is anticompetitive because it would block the north end of the line. The operations would preclude CRC from interchanging at Ivalee and prevent it from competing for overhead traffic. CRC believes that CSX is using Tyson to restrict CRC's prospective short line operations. It believes that granting Tyson's application would sever existing efficient routes and would contravene the public interest and the national transportation policy.

We find that Tyson has demonstrated that it is a financially responsible person under 49 U.S.C. §10910. Like CRC, it has the financial resources to consummate the acquisition and to operate

the line for at least three years. We do not share CRC's concerns about the adequacy of Tyson's operating plan. In investing $5 million to build its new plant, Tyson has clearly shown its intention to operate the trackage for at least the requisite period. Since the plant is not yet in operation, a detailed operating plan would be premature. *See* Chairman Gradison's December 1, 1987, decision at 3. Furthermore, we disagree that Tyson would not provide service to other shippers. Rather, Tyson has indicated that it will serve any shipper who locates on the line, if requested. For these reasons, we find that Tyson has shown it is capable of operating the line

for three years.[13] We also find that the

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[13]In reaching this conclusion, we reject CRC's argument that Tyson must prove that it will operate the line immediately (*i.e.*, that Tyson is not financially able under the statute because the statute requires a three year commitment, and Tyson's mill is not completed). We think CRC misapprehends the statute. The three year provision in §10910 is relevant to the question whether an offeror is a "financially responsible person." The statute, at §10910(a)(1), as relevant, defines such an offeror as one who "is able to assure that adequate transportation will be provided for *** not less than three years." However, it does not follow that an offeror is not financially responsible where service would not begin immediately. Rather, the question before us is whether the offeror's commitment to continue rail service within a reasonable time period is real and whether, once instituted, the service will continue for at least three years. Tyson proposes to purchase this line to serve a mill it is constructing. While there currently are no other affected shippers, there is no question but that Tyson's traffic can support this line, and that Tyson intends to provide service over it. Given the fact that there are no other shippers on the line - and that Tyson seeks to purchase the line to serve its own mill - we think the statutory test has been met here. *See generally Abandonment of R. Lines and Discontinuance of Service,* 365 I.C.C. 249, 260 (1981) (no requirement that rail service be operational before an offer can be considered under the financial assistance procedures at 49 U.S.C. §10905); *cf.* Docket No. AB-167 (Sub-No. 493N), *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY* (not printed), served January 13, 1987, slip op. at 5 (offer not one for continued rail service under §10905 where there is no evidence of availability of sufficient rail traffic).

public convenience and necessity permit the sale of the .15-mile segment between milepost LE 445.0 and LE 445.15. The .15-mile segment is not on CSX's system diagram map, and therefore we cannot make any finding under §10910(b)(1)(A)(ii). The alternative statutory basis for a sale under §10910 is §§10910(b)(1)(A)(i), where this Commission finds that the public convenience and necessity require or permit the sale of a particular railroad line under this section. At 49 C.F.R. §1151.3(a)(11), we state that:

> If the applicant seeks a finding of public convenience and necessity, the application must contain detailed evidence that permits the Commission to find that:
>
> (A) The rail carrier operating the line refused within a reasonable time to make the

necessary efforts to provide adequate service to shippers who transport traffic over the line;

(B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;

(C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;

(D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and

(E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

Here, Tyson is not as yet receiving rail service. There are no other

shippers, and CSX will not be adversely affected. Moreover, Tyson has amply demonstrated it is financially able to operate the line. CSX also has indicated that the sale to Tyson would not interfere with its operations at Ivalee. Finally, the sale would facilitate service to Tyson's plant at Ivalee. Under these circumstances, these showings satisfy the evidentiary standards for finding that the public convenience and necessity permit the sale of the .15-mile segment to Tyson under §§10910(b)(1)(A)(i).

The arguments raised by CRC claiming Tyson's application is anticompetitive have no merit. Tyson has made the determination that it would rather forego the option of service by CRC in order to

avoid what it considers to be the potential for disruption to its own proposed rail operations. It is in a better position to make that determination than anyone else.

Nor can CRC successfully argue that Tyson's application forecloses any competitive opportunities. The Tyson application, if granted, would deny CRC the opportunity to compete for Tyson's business. Since Tyson obviously does not want CRC's service, however, CRC is not in a position to argue that it would suffer any loss. In fact, we note that CRC's proposal, if accepted by CSX, would deny Tyson the opportunity to serve itself, and would render Tyson captive to CRC.

CRC has stated that it also wishes to compete with CSX for overhead traffic. But, Tyson's application, if granted, would preclude CRC from carrying overhead traffic on the line because, as noted above, CRC's operations would interfere with Tyson's proposed service and for that reason we have declined to require CSX to establish an interchange with CRC at Ivalee. Moreover, none of the shippers who would benefit from the establishment of this competitive service have supported CRC. In sum, CRC has offered no support for its bare allegation that it could indeed compete with CSX for that overhead service. Rather, it is clear that CSX does not use the line for overhead service because it is more circuitous than a

parallel (but more direct) CSX route. Given these facts, it is incumbent on CRC to offer more support for its allegations of anticompetitive activity than it has. On this record, we cannot conclude that a grant of Tyson's application would be anticompetitive.

CONSTITUTIONAL MINIMUM VALUE

1. *Overview*. Section 10910 requires that the purchase price of a feeder line be set at the constitutional minimum value. This is defined as not less than NLV or going concern value, whichever is greater. 49 U.S.C. §10910(b)(2).

As noted, CSX and Tyson have already agreed to a purchase price of $36,374 for the 1.61-mile segment of line at Ivalee.

The data submitted in the record only cover the 1.46-mile segment between milepost LE 443.54 and milepost LE 445.0. No valuation data are submitted for the .15-mile segment between milepost LE 445.0 and milepost LE 445.15. Using the data submitted, we find the constitutional minimum value for the 1.46-mile segment at the NLV of $55,671, comprised of a land value of $527 and a net salvage value of $55,144 for track and materials, as explained below. We are obligated by statute to set the price at the constitutional minimum value, and we have done so for that portion of the line for which we have evidence to support a valuation. (If CSX decides to sell the 1.61-mile segment to Tyson, however, it

may do so at a different price that is mutually agreeable. Our role is simply to set the price a carrier may be *forced* to accept.)

We will now proceed to value the line for CRC's application. In valuing the line, we use the same criteria as are used for offers of financial assistance under 49 U.S.C. §10905 to acquire a rail line to be abandoned. *See Feeder, supra,* 367 I.C.C. at 264. Under §10905, the valuation standard is the NLV of rail properties for the highest and best non-rail use. *Chicago and North Western Transp. Co.- Abandonment,* 363 I.C.C. 956 (1981) (*Lake Geneva*), *aff'd sub nom. Chicago and North Western Transp. Co. v. U.S.* 678 F.2d 665 (7th Cir. 1982). The

NLV is the sum of: (1) the value of the real estate; and (2) the net salvage value of track and materials (gross salvage value less cost of removal). Indeed, in §10910 proceedings, the NLV measure is statutorily directed. — 49 U.S.C. §10910(b)(2).

In §10905 proceedings, valuation disputes are resolved according to the burden of proof. The burden is on the offeror as proponent of the relief requested. *Lake Geneva, supra* 363 I.C.C. at 961. A similar approach is warranted here for the same reasons expressed in that case.

Valuation information was contained in an appraisal by SSR's Mr. Skinner (Skinner I) dated March 28, 1984, that was

prepared for SSR's abandonment application in Docket No. AB-55 (Sub-No. 119), *supra*. There, SSR claimed it owned 578.4 acres in fee simple interest valued at $320,600. Cheney opposed SSR's application and believed that SSR could not support the land valuation. Cheney sought an appraisal from SSR through discovery in that case. However, SSR withdrew its application without providing Cheney with Skinner I. Cheney later obtained a copy of the Skinner I appraisal for it submitted a copy with its rebuttal evidence here.

CRC's application asserts an NLV of $1,547,454 consisting of an estimated net salvage value of the entire line. This estimate was based on an analysis by Don

J. Bertel, President of Trax Engineering and Associates (Trax) (Bertel I). CRC originally asserted that the land had no value because CSX held defective title and that the properties were encumbered by easements. CSX responded that the NLV for the entire line should be valued at $2,095,094, consisting of $220,120 for land and $1,874,094 for net salvage value. A land valuation was submitted by Clark Adams, Jr., Director of CSX Realty, Inc., who presented an updated appraisal by Mr. Skinner (Skinner II). Net salvage value was estimated by Russell Abbott, CSX Manager, Facilities Planning (Abbott).

In its rebuttal, CRC modified its NLV estimate to $1,574,513, consisting of $9,419 for land and $1,565,094 for net

salvage value. As discussed below, we will accept with certain exceptions CRC's NLV estimate as the NLV for the line.

2. *Computation of NLV.*

A. *Land.* The only land valuations on record are appraisals performed for CSX by Mr. Skinner. Skinner I estimated the marketable value of unencumbered fee simple titled property. According to the appraisal, Mr. Skinner was advised by CSX that it held 586.48 acres in fee simple. After deducting 8.08 acres for public road crossings, Mr. Skinner valued the net acreage of 578.40 acres for the right-of-way, including the Self Creek and Graystone branches, at $320,600.

Mr. Skinner valued a total of 85 individual parcels, 79 for the right-of-way and six for the Self Creek Branch, as shown on CSX right-of-way track maps. The appraisal valued the line beginning at milepost 395.66 in Greens. Each parcel was valued at the highest and best non-rail use, using a comparison with sales of properties in the vicinity. The value of each parcel was then discounted to reflect a probable sales period of one to five years, with most of the parcels selling in the second and third year. Each parcel was then discounted further to reflect encumbrances on the property, such as the easement for the City of Birmingham's 60-inch water pipeline that runs between the southern end of the line and the Little

Warrior River near milepost 412. Adjustments were also made to reflect utility easements, public use and private roads, size and shape restrictions, etc.

Skinner II updated the appraisal and reduced the real estate value to $220,120. The updated appraisal excludes the segment between milepost 395.66 and 396.88 used in Skinner I and was based on fee interest in 575.32 gross acres, less 7.94 acres for road areas, leaving net acreage of 567.38 acres. Values of some parcels were also reduced when new sales considered for comparison were at decreased values. Skinner II also adjusted the value of several parcels to reflect for the right-of-way property a 60% discount from the value of adjoining property. The

adjustment is based on a comparative sale of a rail right-of-way in Pickens, AL, at a value per acre approximately 60% less than adjoining property.

CRC's rebuttal contains an analysis of Skinner I and Skinner II by Mr. Fauth. Mr. Fauth asserts that Mr. Skinner's appraisal did not adjust the values of several parcels fully to reflect easement interests. His second criticism is that some parcels were overvalued because they were valued for *potential* "highest and best use" rather than *present* "highest and best use." According to Mr. Fauth, some parcels valued by Mr. Skinner for industrial use should be valued for agricultural use. Mr. Fauth also disputes the potential industrial use of some

parcels, where easements on the property preclude use of the property for industries. Mr. Fauth reviewed Mr. Skinner's appraisal of each parcel and reduced the total land value of the 567.38 net acres to $105,911.

CRC has the burden of proof to establish the value of the line. We find that Mr. Fauth made appropriate adjustments to Mr. Skinner's appraisal to arrive at the $105,911 valuation. On this record, those adjustments have been justified and appear best to reflect the use to which the various parcels could be put. CRC has also demonstrated that CSX holds only an easement interest in most of the right-of-way, however. This

necessitates a further reduction in the valuation.

CRC obtained from CSX copies of deeds and other records for the properties in the right-of-way. Most properties were conveyed to CSX predecessors by documents entitled "Right-of-Way Deed." CRC asserts that, under Alabama law, these instruments conveyed easements, not fee simple title, to land. CRC asserts that no value should be accorded to these easement interests. CRC asserts further that no value should be accorded property subject to reserved mineral rights or in instances where CSX could not produce evidence of title.

Using Mr. Fauth's figures as a basis, CRC further decreased the valuation estimates to reflect easement rather than

fee interests.[14] As a result, CRC asserts that CSX holds marketable fee simple title to only 79.9 acres of property at a value of $9,419.[15]

We must decide whether CSX has marketable title for valuation purposes under §10910. In determining NLV, we have held that only real estate having marketable title will be assigned value. *See, e.g.*, Docket No. AB-43 (Sub-No. 136), *Illinois Cent. G. R. Co. - Aband. - In Christ, Macon and Shelby Counties, IL* (not printed), served August 1, 1986. An easement for railroad purposes in not

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[14]Alleged title defects are detailed in the verified statement of John B. Cheney in Appendix VI to CRC's rebuttal statement. Mr. Cheney also presented copies of CSX valuation maps and property deeds, including the water pipeline easement. Mr. Cheney prepared an index linking the deeds to the individual parcels used by Mr. Skinner.

[15]*See* Appendix IV to CRC rebuttal statement.

considered to be marketable title. See Docket No. AB-31 (Sub-No. 8), *Grand T. W. R.R. Co. - Abandonment in Montcalm and Gratiot Counties, MI* (not printed), served May 18, 1984.

CRC has established that CSX has only an easement, rather than a fee interest, for 466.8 of the 567.38 acres of the right-of-way. (While CRC submitted this argument on rebuttal, CSX has not asked that this evidence be stricken, nor has it sought to supplement the record to address or rebut the CRC's contentions. Thus, we will accept it.)

CRC also argues that one holding land in Alabama subject to reserved mineral rights does not hold good and marketable fee simple title, citing *Shel-Al Corp. v.*

American National Insurance Co., 492 F.2d 87, 92 (5th Cir. 1974). We note that 89 acres of the right-of-way subject to reserved mineral rights are located on property held by CSX by right-of-way deed that we found above to convey easement interests only. Thus, we have already excluded the valuation for these parcels, leaving approximately 12.5 acres of property with a valuation of $885. CRC asserts that this $885 should be deleted from the valuation on the grounds that CSX does not have a fee interest. CSX has not rebutted CRC's argument regarding mineral rights. Accordingly, because the title is encumbered, we will subtract the $885 value assigned to this property.

Finally, since we will assign no value where CSX is not shown to have marketable title, we agree with CRC that no value should be accorded for a property where CSX has not produced evidence of any title. Accordingly, a zero value is assigned for the 14.9 acres where CSX does not have evidence of title.

Thus, we accept CRC's total value for land of $9,419.

B. *Net salvage value*. CRC estimates the net salvage value of track and materials at $1,547,454, consisting of $2,487,684 gross salvage value, less recovery cost of $940,230.

This estimate is based on a one week field inspection by Trax engineers, reported in Bertel I. Mr. Bertel states

that the Trax inspectors examined ballast, rail, turnouts, other track material, bridge and road crossings. A sampling was made of cross and switch ties. Current market values were used for materials. Cost of removal was based on a rail contractor's bid on the project.

CSX submitted its own salvage estimate valuing the track and material at $2,537,187 less removal costs of $662,213 for a net salvage value of $1,874,974. CSX's estimate is based on testimony of Mr. Abbott. Mr. Abbott bases his estimate on periodic inspections of track between 1984 and 1987 plus CSX company records indicating the amount of trackage owned. Mr. Abbott asserts that Mr. Bertel's original estimate did not reflect all the

material shown in CSX company records, particularly turnouts. Also, Mr. Abbott claims Mr. Bertel did not have access to CSX production information to know when crossties were installed.

CRC discounts CSX's assertion that company records accurately reflect the materials on the line. In his rebuttal, Mr. Bertel (Bertel II) points out that the Trax inspectors found that some track material had been removed, retired, cannibalized for parts, or vandalized. Trax inspectors also found material stored adjacent to the right-of-way; this material was not valued by Trax.[16]

Another difference between the two valuations is the estimate for "landscape

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[16]Bertel II, p. 7.

ties." The Trax analysis includes $151,477 for "landscape ties" to reflect ties that are reusable for landscape purposes. Without explanation, Mr. Abbott eliminated the "landscape ties" value when he analyzed CRC's data. We will accept Trax's estimate to reflect a reusable resource with salvage value.

CRC and CSX also differ in their estimates of removal costs. CSX maintains that CRC has not accurately reflected the cost differences for removal of welded rail as opposed to bolted rail.

CRC has satisfied its burden of proof to establish the gross salvage value of track and material. We believe that a physical inspection provides more accurate evidence of the condition of track and

materials than company records. However, we must make certain adjustments to CRC's gross salvage value.

The first adjustment to CRC's gross salvage value is to exclude $49,000 claimed for recoverable ballast. CRC witness Bertel estimates that 24,500 tons of crushed rock and limestone used as ballast could be recovered and disposed of at $2 per ton. The inclusion of ballast in computing NLV raises an issue of first impression. Our experience in abandonments indicates that ballast is not a recoverable asset for NLV. Usually the costs to remove and clean the material exceed any proceeds a carrier could derive from disposal. Here, CSX witness Abbott does not even mention ballast as a

recoverable asset in his computation of net salvage value. Given our experience, we are not inclined to accept CRC's estimate for recoverable ballast without convincing evidence that the material has value. Bertel's unsupported estimate is not adequate by itself. Thus, we will exclude this item.[17]

The second adjustment is based on CSX's criticism that CRC's field inspection was conducted prior to repairs to the line (3,528 second-hand cross ties were installed). CSX estimates that these ties would add $85,000 in materials and installation costs to the value of the line. CRC witness Bertel responds that

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[17]Since we have excluded CRC's gross salvage estimate for ballast, CRC's claimed removal costs for ballast may not be accepted.

$17,640 should be added to his gross salvage value based upon his estimate for second-hand ties, but he did not include installation costs. (Bertel II at 7-8.) We agree with CRC that its valuation of the second-hand ties should be added. Contrary to CSX's view, the salvage value of material does not include their installation cost. Thus, with the removal of $49,000 in ballast value and the addition of $17,640 to reflect recently added ties, CRC's gross salvage value is adjusted to $2,456,324.

Third, the CRC removal cost estimate is flawed, in that it does not clearly differentiate cost of removal of welded rail versus bolted rail. In view of the flaws in CRC's removal cost estimate and

CRC's burden of proof, we will accept CSX's estimated removal costs of $662,213.

3. *Summary.*

The net salvage value for the line is found to be $1,794,111, consisting of $2,456,324 gross salvage value less removal costs of $662,213. The net salvage value for the 1.46-mile segment at Ivalee is found to be $55,144.[18]

The NLV for the entire line is $1,803,530 ($9,419 land value plus $1,794,111 net salvage value). The NLV of the 1.46-mile segment at Ivalee is $55,671

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[18]The gross salvage value of the 1.46-mile segment at Ivalee was ascertained to be $74,364 by using the inventory of track and material listed in Appendix H to the statement of Abbott, and the unit prices reflected on page 18 of Bertel I. CSX's removal cost of $19,720 was then applied, resulting in a new salvage value of $55,144.

($527 land value, plus $55,144 net salvage value). Excluding the 1.46-mile segment, the NLV for the remainder of the line is $1,747,859.

JOINT RATES

CRC has requested that we set joint rates applicable to traffic moving on the line pursuant to §10910(f). As discussed earlier, the traffic density on the line is well within the three million GTM/M threshold of the statute which permits us to require the establishment of reasonable joint rates.

CRC requests that CSX's rates existing as of March 19, 1987, covering traffic to and from the lines be converted into joint rates between CRC and CSX, and

divided on the basis of the 100% factor of Division Basis DB 411-B issued by the Southern Freight Tariff Bureau.

CSX opposes a division arrangement with CRC and offers, instead, a rate factor of $200 per car for existing traffic between Landmark and Graystone, AL. For projected further movement of pulpwood, coal and other commodities, CSX offers to negotiate prices with CRC at the appropriate time. It states it cannot quote per-car prices until CRC provides concrete information on possible future movements.

CSX states further that it is moving away from division arrangements with short lines. It believes that market conditions require quick responses, requiring each

party to a movement to be free to quote its own charges. A division arrangement is seen as an impediment to market responsive pricing. In dealing with new short lines, CSX states it has been establishing independent factor rates similar to the "Multiple Independent Factor Through Rate" concept, whereby CSX's and the short line's revenue requirements are expressed individually. Each carrier can change its factor at any time. To accomplish this, CSX states it immediately offers the short line operator a commodity-based, per-car revenue arrangement on existing traffic. Changes in rates due to new traffic or competitive concerns would be negotiated.

The Commission has specified the information that should be supplied under §10910(f). 49 C.F.R. §115.13(a)(14); §1151.4(c). Moreover, we have recently adopted procedures for the prescription of joint rates in 49 C.F.R. Part 1144, *Intramodal Rail Competition*. The procedures first require the parties to resolve rate disputes through negotiation or arbitration, 49 C.F.R. §1144.2. Here, CSX and CRC have thus far been unable to reach agreement on rates. However, this does not mean that we have before us adequate information to prescribe joint rates at this time.

Section 10910(f) provides that we must establish reasonable joint rates. Moreover, Congress has made clear in

enacting the Staggers Act what it meant by the word "reasonable." In the Report of Committee in Conference, Report No. 96-1430 printed September 29, 1980, at page 90, it said:

> A joint rate must be reasonable, as must the divisions of such a joint rate between carriers, and the Commission should not interfere to require joint rates or any carrier's division of a joint rate to be maintained *below the rate levels permitted by this Act* (emphasis added).

On the following page, the Conference Committee makes specific reference to the market dominance standard of 180 percent of variable cost after September 30, 1984. *See also* 49 C.F.R. §1151.4(e).

Although CRC has requested that we prescribe joint rates, it has not submitted any cost data to establish the

reasonableness of the joint rate it proposes, as required by 49 C.F.R. §§1151.3(a)(14) and 1151.4(c). CRC has not even provided us with the applicable tariff provisions under which Cheney traffic currently moves. Thus we have no information on which to judge the propriety of CSX's division under this Congressional directive. Therefore, we have no basis for prescribing joint rates at this time. If CRC submits additional cost information to allow us to determine if its proposals are in fact "reasonable," we will institute a separate proceeding as provided in *Feeder, supra,* 367 I.C.C. at 271. Since the statute provides that we must establish such a joint rate within 30 days after the filing of such a petition,

we will require (as we already do in our rules) that the petition contain all the necessary information that will allow us to establish a reasonable joint rate. CSX must respond to such a petition within 10 days. If CRC requires information from CSX to develop the proposed joint rate, it should obtain it through discovery before filing the petition, and we authorize such discovery to begin immediately.

LABOR PROTECTION

RLEA, UTU and BLE request that labor protection be imposed. Section 10910(g) requires that the selling carrier be obligated to provide a fair arrangement at least as protective of the interests of employees as that established in §11347.

In feeder line applications, we impose the conditions in *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1960), which would be used here to protect CSX employees.[19] The cost of labor protection may not be included in the purchase price of the line. 49 U.S.C. §10910(b)(2).

CRC and Tyson propose to use their own employees to operate their lines and do not expect to hire CSX employees who presently work on them. Indeed, CRC has specifically requested that we not order it to hire CSX employees. However, under §10910(e), we are to require, to the maximum extent practicable, the use of

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[19] *Cf. Indiana Hi-Rail Corp., supra*, 366 I.C.C. at 50.

employees who would normally have performed work in connection with this line. There is no evidence here for us to determine how the sale of this line will affect CSX employees. Nor is there any evidence of the employee needs of CRC and Tyson to operate the line, except for the statement indicating that they do not seek to hire CSX employees. In accordance with §10910(e), we direct that CRC and/or Tyson, should they need to hire any new employees to operate the line, they shall offer employment to CSX employees who worked on the line. (CRC and Tyson would not be obligated to continue to pay the same wages or provide the same work rules as has CSX.)

ENVIRONMENTAL CONCERNS

We agree with the environmental assessment (EA) prepared by the Commission's Section of Energy and Environment (SEE), which finds that the sale of the line to either CRC or Tyson would not have significant effects on the quality of the human environment or energy conservation. However, since this transaction does involve a change in ownership of the line, we will require that the new owners consult with the Alabama Historical Commission if they intend to make substantial changes to structures on the line that are more than 50 years old.

ULTIMATE CONCLUSIONS

CRC and Tyson have demonstrated that each is financially responsible and able to provide adequate service. CSX is required to negotiate sale with either CRC of the above-described 1.46-mile segment at Ivalee, or Tyson of the above-described 1.61-mile segment at Ivalee, and with CRC for the remaining 54.61 miles of involved rail lines between Greens and Ivalee. The 1.46-mile segment at Ivalee is valued at $55,671. For the entire line, excluding the 1.46-mile segment at Ivalee, the constitutional minimum value is $1,747,859. (However, CSX and Tyson are not precluded from selling the 1.61-mile segment for the price they have previously agreed upon). CSX must notify us within

15 days of the service date of this decision of its choice between CRC and Tyson.

CSX and CRC are directed to establish interchange for traffic at Mt. Pinson. To facilitate interchange at Mt. Pinson, CSX is granted trackage rights between mileposts LE 396.38 and LE 399.2.

When necessary cost data is submitted by CRC, we will institute a separate proceeding to establish reasonable joint rates.

To protect CSX employees, we impose the protective conditions in *New York Dock, supra*. Should CRC and Tyson require new employees for the purpose of operating the subject line, they shall offer

employment to CSX employees who operated the line.

CRC and Tyson will be exempt from the provisions of Subtitle IV of 49 U.S.C. except for the joint rate provisions of Chapter 107.

To ensure the smooth transfer of the line, we will establish the following terms traditionally used in §10905 cases: (1) payment will be made by cash or certified check; (2) closing will occur within 90 days after the service date of this decision; (3) CSX will convey all property by quit-claim deed; (4) CSX will deliver all releases from any mortgages and original documents conveying interest in the right-of-way to purchasers within 90 days from closing; (5) all taxes should

be prorated as of the date of closing; and (6) deed recording fees should be paid by purchaser. Mortgage or lien release taxes, or recording fees should be paid by CSX. The parties may modify the terms of the sale by mutual agreement.

As conditioned, this action will not significantly affect the quality of the human environment or energy conservation.

COMMISSIONER LAMBOLEY, dissenting in part:

I concur in this decision to the extent that both applicants are found to be financially responsible.

However, I would grant a northern interchange point with CSX to CRC and I do not agree that CSX should be authorized to negotiate with either CRC or Tyson for the

sale of the 1.46 mile segment at Ivalee. I would direct CSX to sell the entire line to CRC, because its operation of the entire line is more consistent with feeder line development objectives and the rail transportation policy. If CRC were unable or unwilling to consummate the sale, then CSX could be directed to sell to Tyson.

It is ordered:

1. CRC and Tyson must notify the Commission by February 9, 1989 accepting or rejecting our determination. A copy must be served on CSX.

2. CSX must select the applicant with whom it will transact business for the line segment at Ivalee and file notice

of the selection with the Commission by February 14, 1989. A copy of the notice must be served on CRC and Tyson.

3. CSX must negotiate sale with: (1) either (a) CRC for the above-described 1.46-mile segment at Ivalee, or (b) Tyson for the above-described 1.61-mile segment at Ivalee; and (2) CRC for the remainder of the 54.61 miles of trackage between Greens and Ivalee, AL and must notify the Commission of the agreement to sell within 30 days of the service date of this decision.

4. The purchase price for the line between milepost LE 396.38 and milepost LE 445.0, between milepost CA 419.50 and milepost CA 421.45, and between milepost LH 402.80 and milepost LH 407.04 is fixed

at $1,804,415. The purchase price for the segment between milepost LE 443.54 and milepost LE 445.15 is fixed at $55,671. The purchase price for the line, excluding the segment between milepost LE 443.54 and milepost LE 445.15, is fixed at $1,747,859. Other terms of sale must comport with those set forth above.

5. CRC's petition to reopen the April 19, 1987, decision denying its motion to reject Tyson's application is denied.

6. CRC's request to waive 49 C.F.R. §§1104.2(a) and 12(a) and 49 C.F.R. §1151.5(b) is granted.

7. CRC's request for oral hearing is denied.

8. CSX's motion to strike certain argument and evidence in CRC's rebuttal is denied.

9. CRC and Tyson must consult with the Alabama Historical Commission if either intends to make any substantial changes to structures on the line more than 50 years old.

10. This decision is effective on March 1, 1989.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Lamboley dissented in part with a separate expression.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31012

CHENEY RAILROAD COMPANY, INC. --
FEEDER LINE ACQUISITION --
CSX TRANSPORTATION, INC. LINE
BETWEEN GREENS AND IVALEE, AL

Finance Docket No. 31012 (Sub-No. 1)

TYSONS FOODS, INC. -- FEEDER LINE
APPLICATION -- CSX TRANSPORTATION, INC.
LINE AT IVALEE, AL

Decided: May 28, 1987

We are denying a motion by Cheney Railroad Company, Inc. (CRC) to reject the competing feeder line application by Tysons Foods, Inc (Tysons).

On March 17, 1987, CRC filed an application under the Feeder Railroad Development Program, 49 U.S.C. 10910, to purchase 54.61 miles of rail lines owned

by CSX Transportation, Inc. (CSX) between Greens and Ivalee, AL. On April 20, 1987, Tysons filed a competing application to purchase 1.61 miles of CSX line at Ivalee.

On April 29, 1987, CRC moved that the Commission reject Tyson's competing application. CRC claims that Tyson's application is legally improper because section 10910 does not specifically authorize competing applications. It points to the legislative history of the Staggers Rail Act of 1980, where provisions authorizing competing applications in the House Bill were deleted from the final version of section 10910. It thus claims that section 10910 only allows one feeder line application per line.

It claims further that Tyson's application is defective in several respects. According to CRC, Tysons has not demonstrated it is financially responsible as required by section 10910 (a) (1), by showing that it will either serve the public, or operate the line for at least three years. CRC asserts further that Tyson's application does not satisfy several formal requirements in 49 CFR 1151. CRC contends that Tyson's application fails to: state the county where the line is located; give the addresses of Tyson's officers and directors; provide an estimate of operating costs; provide supporting evidence for real estate and track valuation; show that it has liability

insurance for the proposed operation; state that if the application is approved, no further preconditions will be placed on shippers without Commission approval; address the factors for public convenience and necessity findings; and show willingness to submit to Commission jurisdiction for joint rates.

Tysons replied, stating that competing feeder line applications can be considered. It believes that its application is complete and that CRC's criticisms are frivolous and inconsequential.

We will deny CRC's motion. Our feeder railroad procedures allow the filing of competing applications. 49 CFR 1151.2 (d). In fact, when the Commission

considered revisions to the procedures in Feeder Line, infra, we specifically requested comments on whether competing applications should be allowed. The vast majority of comments favored permitting competing applications. Feeder Railroad Development Program 367 I.C.C. 261, 266 (1983) (Feeder Line).

The argument made by CRC that the Commission lacks statutory authority to permit competing applications in feeder line cases is without merit. The legislative history of section 10910 does not support the argument made by Cheney. The conference substitute apparently deleted the House bill's provisions authorizing such applications. However, no explanation was given, nor any

prohibition added. H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess. 124-25 (1980). The existing statutory language does not preclude such applications, and, accordingly, we conclude that statutory authority to consider them is properly inferred. The Commission has historically considered concurrently competing applications where they involve overlapping rights, pursuant to the Supreme Court's decision in Ashbacher Radio Corp. v. Federal Communications Commission, 326 U.S. 327. The Commission's position was upheld; see United States v. Pierce Auto Freight Lines, 323 U.S. 515 (1946), and the policy underlying that practice is applicable to the applications in this case.

We also reject CRC's claim that Tyson's application is defective. The application is complete and satisfies the formal requirements of Part 1151. CRC's other objections to Tysons' application will be considered when we review the merits of the competing proposals. We here hold only that Tysons' application should not be rejected.[1]

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. CRC's motion to reject Tyson's competing application is denied.

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[1]Tysons also filed a motion for a protective order to stay discovery sought by CRC until CRC's motion is ruled upon. Having denied CRC's motion to reject Tyson's application, a protective order is not necessary.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley concurred. Commissioner Sterrett did not participate.

(SEAL)

Noreta R. McGee
Secretary

APPENDIX G

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31012[1]

CHENEY RAILROAD COMPANY, INC. --
FEEDER LINE ACQUISITION --
CSX TRANSPORTATION, INC. LINE
BETWEEN GREENS AND IVALEEE, AL

Decided: May 20, 1987

I am denying a petition by Cheney Railroad Company, Inc. (CRC) to compel CSX Transportation, Inc. (CSX) to produce certain documents and records.

On March 19, 1987, CRC filed an application under the Feeder Line Development Program, 49 U.S.C. 10910, to

[1]Embraces Finance Docket No. 31012 (Sub-No. 1), Tysons Foods, Inc. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line at Ivalee, AL.

purchase a rail line owned by CSX between Greens and Ivalee, AL.[2] Also being considered is a competing application by Tysons Foods, Inc. (Tysons) to purchase a 1.61 mile segment of CSX's line at Ivalee.[3]

On April 22, 1987, CRC asked the Commission to compel CSX to produce certain documents and records it claims are relevant to issues in the proceeding. CSX responded that it would furnish some of the documents CRC requested, but it objected to producing the remainder. On

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[2]CRC's application involves 54.61 miles of track between: (1) milepost LE 396.38 and milepost LE 445.0; (2) milepost CA 419.50 and milepost CA 421.25 (Graystone Branch); and (3) milepost LH 402.80 and milepost LH 407.04 (Self Creek Branch).

[3]CRC has moved to reject Tysons' competing application, and Tysons has asked that it not be required to respond to any CRC discovery until that motion is decided. These matters will be addressed in a subsequent decision. My decision here imposes no burden on Tysons.

May 4, 1987, CRC requests that CSX be compelled to produce the remainder of the documents sought.

CRC seeks production of 15 types of documents. Of those, CSX agreed to furnish copies of: its labor operating rules (Item 1) and certain property records; appraisals (Item 2); track and bridge inspection reports (Item 3); valuation maps (Item 5); line profile (Item 6); property interest in the underlying right-of-way (Item 7); encumbrances in the right-of-way (Item 8); and salvage contracts (Item 11).

In Item 4, CRC seeks documents pertaining to diversion and rerouting of overhead traffic. CRC claims that these documents affect whether a going concern value may be asserted by CSX for the line.

CSX responds that the only segment for which it is asserting a going concern value is the 1.61-mile segment at Ivalee that Tysons seeks to acquire in the competing application. It states further that it will seek a net liquidation value on the remainder of the line. As a result, it claims that overhead traffic data for determining going concern value is irrelevant to CRC.

I agree with CSX that the overhead traffic data is not relevant here. CSX has acknowledged that going concern value is only in issue regarding the 1.61 miles Tysons proposes to acquire. Accordingly, there is no indication here that CSX overhead traffic would materially affect going concern value asserted for the segment so as to warrant production of the

extensive data Cheney seeks.

In Item 9, CRC seeks computer tapes for all traffic handled on the line since January 1, 1985, as well as for traffic formerly moving on the line that was diverted to other lines. It also seeks specific information about each movement, such as origin and destination points, origin and destination carriers, other participating carriers, junctions, route, car type and owner, applicable rate, revenue generated, CSX portion of revenue, CSX variable cost, and the source of the applicable rate (i.e., tariff, contracts or exempt letter quote). CRC claims this data is relevant to establishing rate divisions and to identify traffic that could be interchanged. In Item 10, CRC requests copies of all rail rate contracts

and exempt letter quotes, also claiming that this information is needed to evidence CSX revenues and costs for handling traffic that could be interchanged.

CSX agrees to supply computer tapes for local traffic it handled on the line. This information will show CSX revenue for the traffic. However, it states that data for overhead movements is irrelevant. It states further that the tapes for local traffic will not show the entire routing, the applicable rate, total revenue, or its variable costs in handling shipments. This information, CSX claims, would require special studies requiring great time and expense. CSX objects that rate contracts are confidential and cannot be disclosed to CRC.

The line in question is in Category 1 and 2 of CSX's current system diagram map. CRC therefore need only pay the constitutional minimum value in order to acquire the line. 49 U.S.C. 10910(b)(1). Since applicant need not demonstrate public convenience and necessity in its application, and need not establish going concern value for the majority of the line, the information which it seeks under Items 9 and 10 are relevant only to the issue of the divisions which it seeks with CSX. CRC seeks divisions with CSX on the basis of the 100 percent factor of Southern Freight Tariff Bureau Division Basis 411-B (DB4110B). In its application, CRC provided its own traffic projections based on local traffic generated on the line and based in part on

data supplied by CSX in AB-55 (Sub-No. 119) for the period April 1983 to March 1984. The Commission's regulations at 49 CFR 1151.3(a)(14) require feeder line applicants who request the Commission to provide joint rates and divisions to justify, on a cost basis, their proposals for revenue divisions. Therefore, the applicant is requested to project revenues from divisions and total operating costs. The Commission held, in the Finance Docket No. 29995, Prairie Cent. Ry. Co. -- Feeder Line Acquisitions -- Illinois Central Gulf R. R. Co. (not printed), served January 12, 1983, (Prairie Central) that the information relevant to that determination is not the existing operator's past experience but rather the applicant's estimate of what its experience will be in

the future, based on its proposed levels of service and its expected costs. The Commission denied applicant's request for cost and revenue data from the existing operator in Prairie Central and I deny it here for the same reason, based on that precedent. While information on CSX's past traffic (contract and otherwise) would be useful to CRC in predicting the viability of its intended operations, it is not so relevant to the proof CRC must offer in this case that CSX should be required to provide it. As essentially only local traffic is at issue, CRC can develop future predictions on its own, based on its own projected revenues and costs with reference to potential local traffic on the line. Indeed, as principal shipper on the line CRC is the source for

most of the local traffic and should be aware of those figures.

In Items 12 and 13, CRC requests copies of agreements, proposals and other information pertinent to the Tyson's application. CRC claims that CSX fostered and encouraged Tyson's competing application and that the dccuments sought will enable it to respond to the application. CSX responds that any agreement with Tysons is confidential. It states further that any assistance that it provided Tysons in preparing its competing application is irrelevant to CRC's application. It acknowledges it spent much time and money to assist Tysons in locating its mill at Ivalee and supports its competing application.

I agree with CSX that the documents sought by CRC in Items 12 and 13 are irrelevant. Our procedures permit the filing of competing applications. See Feeder Line Development Program, 367 I.C.C. 261, 266 (1983). CRC will have its opportunity to respond to Tyson's application. The requested data has not been shown to be material for CRC's response. Should we find both applicants qualified, CSX will be required to select the purchaser of the segment at Ivalee.

In Item 14, CRC seeks copies of division agreements on traffic moving on the line since January 1, 1985. CSX objects that this information would require a special study. It claims further that the data would be irrelevant because most of the traffic caused by

those agreements is overhead traffic, none of which now moves over the line. As noted above, CRC has already produced information on requested divisions and submitted data in support. In view of this presentation, the additional division information sought by CRC is unnecessary.

Finally, in Item 15, CRC requests copies of "all documents, letters, memoranda, reports, notes, studies or other written material whatsoever pertaining to the line created on or after January 1, 1985." CSX objects that this request is merely a fishing expedition. It also points to the Commission's discovery rules requiring that requests for production of documents "should specify with particularity the documents and material" to be produced. 49 CFR

1114.22(b)(4). I agree with CSX that the request in Item 15 contravenes section 1114.22(b)(4).

Accordingly, I will deny CRC's request to compel CSX to produce the above documents.[4]

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. CRC's petition to compel production of documents and records is denied.
2. This decision is effective on the date of service.

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[4]CRC had originally requested that CSX produce documents in McLean, VA. CSX objected stating that the documents would be available at its office in Jacksonville, FL. Apparently the parties agreed for CSX to furnish documents in Jacksonville.

By the Commission, Jane F. Mackall,

Director, Office of Proceedings.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX H

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31012[1]

CHENEY RAILROAD COMPANY - FEEDER LINE ACQUISITION - CSX TRANSPORTATION, INC. LINE BETWEEN GREENS AND IVALEE, AL

Decided: July 7, 1987

Cheney Railroad Company (CRC) has appealed a decision by the Director of the Office of Proceedings served May 27, 1987, that denied its petition to compel CSX Transportation, Inc. (CSXT) to produce certain documents and records. I will deny the appeal.

[1]Embraces Finance Docket No. 31012 (Sub-No. 1) Tyson Foods, Inc. - Feeder Line Application - CSX Transportation, Inc. Line at Ivalee, AL.

CRC applied under the Feeder Line Development Program, 49 U.S.C. 10910 to purchase 54.61 miles of CSXT rail line between Greens and Ivalee, AL. A competing application by Tyson Foods, Inc. (Tyson) to purchase 1.6 miles of CSXT line at Ivalee, AL is also being considered.

On May 4, 1987, CRC requested that the Commission compel CSXT to produce certain documents and records pertaining to overhead traffic (identified as Items 4, 9, 10 and 14) and Tyson's competing application (identified as Items 12 and 13) that it claims are relevant to the application. CSXT objected to producing the documents asserting they are irrelevant and burdensome.

The documents sought in Item No. 4 pertain to diversion and rerouting of overhead traffic. CSXT moved overhead traffic on the line up until October 25, 1986; it then rerouted overhead traffic over other CSXT lines. CRC originally sought these documents claiming that they affect whether a going concern value may be asserted for the line. CSXT responded that it would seek a going concern value only for the 1.6 miles of line involved in Tyson's application and would argue to the net liquidation value for the remainder of the line. The Director agreed with CSXT that overhead traffic was not relevant, and denied CRC's request for documents.

In Item No. 9, CRC sought computer tapes for all traffic handled on the line

since January 1, 1985, including overhead traffic. It also sought specific information for each shipment such as origin and destination points, origin and destination carriers, junction, route, car type, applicable rate, revenue generated, CSXT portion of revenue, CSXT variable cost and source of applicable rate (tariff, contracts or exempt letter quotes). CRC claims this information is relevant to establish rate divisions and identify traffic that could be interchanged. In Item No. 10, CRC sought copies of rate contracts and exempt letter quotes claiming this information is needed to establish CSXT revenue and costs for traffic that could be interchanged.

CSXT furnished CRC with computer tapes for local traffic that would show the revenue for the traffic, but it objected that overhead traffic data was irrelevant. CSXT stated further that the tapes for local traffic would not show the entire routing, the applicable rate, total revenue, and the variable costs in handling the shipment and claims that producing this information would require special studies requiring great time and expense. It also objected that rate contracts are confidential and cannot be disclosed.

The Director agreed with CSXT's objections to producing the information in Items 9 for overhead traffic and rate contracts in Item 10. The information

sought would be relevant only to the request by CRC for establishment of joint rates and divisions with CSXT. The Director held that CRC is obligated to justify on a cost basis the request for joint rates and divisions. The Director also indicated that in Finance Docket No. 29995, Prairie Cent. Ry. Co.-Feeder Line Acquisition-Illinois Cent. Gulf RR. Co. (not printed), served January 12, 1983, the Commission held that the existing operator's past experiences are not relevant for establishing joint rates and divisions. What are relevant are the applicants' protections of future experiences based on estimates, proposed traffic, service levels and expected costs. The Director noted further that

CRC's traffic, revenue and cost projections were based on local traffic only. Since CRC's parent would be the principal shipper on the line, the Director determined that CRC can develop projections on its own and need not obtain additional data from CSXT, including overhead traffic data.

In Item 14, CRC seeks copies of division agreements on traffic moving on its line since January 1, 1985, including overhead traffic. CSXT objected that the data are irrelevant because most of the traffic subject to the agreement is overhead that has been diverted from the line. Also, CRC provided information when CRC requested divisions on the basis of the 100 percent factor in Southern Freight

Tariff Bureau Division Basis 411-B (DB4110B). In view of the presentation, the Director denied CRC's request for CSXT to produce the additional information.

CRC appeals the Director's denial of Items 4, 9, 10, and 14. It argues that the data sought pertain to its request for joint rates and divisions, including joint rates for overhead traffic. It argues that under 49 U.S.C. 10910(b), before the Commission can address the joint rate and division request, a threshhold issue should be resolved: whether the line carried less than 3 million gross ton miles of traffic per mile (3 MGTM/M) in the proceeding year. CRC presented a statement from Gerald W. Faust, III that estimated traffic density on the line in

1986 at less than 3 MGTM/M. The estimate was based on the assumption that 2 local trains were operated on the line per day from the period January-October 1986 averaging 1,993.60 gross tons per train. CSXT responded that Mr. Faust's projections were incorrect and that the two trains that operated over the line were "through trains" carrying overhead traffic averaging 5,505.25 gross tons. Under CSXT's calculations, substantially more traffic than 3 MGTM/M were carried on the line in 1986. CRC points out that overhead traffic data is needed to resolve this threshhold issue.

CRC argues further that the data sought could also determine what overhead traffic CRC may practically participate

in. CRC points out that CSXT has asserted that CRC cannot economically operate the line for local traffic only, and the line is not a viable route for overhead traffic. CRC states CSXT has placed overhead traffic in issue, thus overhead traffic data is now relevant.

CSXT responds that CRC has still not shown that overhead data is relevant. For example, CSXT notes, CRC's operating plan discusses handling of local traffic only, and revenue and cost projections are based on local traffic. Even the request to establish joint rates, CSXT points out, involves movements to and from stations on the line, and joint rates are not sought for overhead traffic.

I affirm the Director's conclusion that overhead traffic data has not been shown to be relevant. The evidence of CRC's expected operations, operating plans, financial projections and traffic prospects shows that CRC proposes to provide service for traffic that originates or is destined to stations on the line. No evidence is presented that CRC also proposes to participate in overhead traffic. At this point, CRC can only speculate that it could participate in overhead movements. Moreover, that speculation is not sufficient reason to require CSXT to produce overhead traffic data which is unlikely to be relevant to any overhead traffic a short line carrier operating approximately 50 miles of

railroad would handle. I will not authorize discovery to be used as a fishing expedition to assist CRC in developing marketing plans for long haul interline traffic.

I also reject CRC's assertion that overhead traffic data is required to resolve the 3 MGTM/M threshold. Since the line now carries local traffic, traffic density should reflect local traffic levels. CRC has already obtained local traffic data from CSXT. Also, as the Director indicated, CRC is a subsidiary of the principal shipper and should have access to data on local traffic volume in 1986. We will also accept actual traffic volume from November 1, 1986, as a basis

for a projected annualized figure to determine the traffic density.

I also affirm the Director's rejection of CRC's request for CSXT to produce documents in Items 12 and 13 concerning Tyson's competing application. CRC claims that CSXT and Tyson cooperated to preclude CRC from participating in overhead traffic and handling Tyson's traffic and competing with CSXT. It seeks documents to substantiate these charges. The Director determined that the documents are irrelevant. I agree. Competing feeder line applications are permitted by our procedures. See Feeder Line Development Program, supra 367 I.C.C. 261, 266. CRC will be able to respond to Tyson's application. However, CRC has not

shown here that the requested data is needed for its response. CRC has also filed a motion to compel answers to discovery requests it has served on Tyson, and this matter will be reviewed again in that context.

Finally, CRC requests a delay in its response pending completion of discovery. As noted, on June 8 and 25, Cheney filed further motions to compel CSXT and Tyson, respectively, to respond to interrogatories, and in those motions sought an extension in its deadline for filing additional evidence to "at least 14 days after appropriate responses to discovery have been provided by CSXT and Tyson." Also pending is CRC's request filed April 29, 1987, to depose Tyson's

president and for production from Tyson of documents and materials, and Tyson's response filed June 15, 1987. I will extend the due date for filing CRC's rebuttal evidence until 14 days following the issuance of a decision resolving CRC's pending discovery requests.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. CRC's appeal is denied.

2. This decision is effective on the date of service.

3. The due date for CRC's rebuttal is extended to 14 days after action on its pending discovery request.

By the Commission, Heather J. Gradison, Chairman.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX I

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31012

CHENEY RAILROAD COMPANY -
FEEDER LINE ACQUISITION -
CSX TRANSPORTATON, INC.
LINE BETWEEN GREENS AND IVALEE, AL

Finance Docket No. 31012 (Sub-No. 1)

TYSON FOODS, INC.-
FEEDER LINE APPLICATION -
CSX TRANSPORTATION, INC.
LINE AT IVALEE, AL

Decided: August 10, 1987

This decision disposes of requests by Cheney Railroad Company (CRC) to obtain discovery from CSX Transportation Inc. (CSXT) and Tyson Foods, Inc. (Tyson) in these competing feeder line applications.

Parties may obtain discovery of any matter, not privileged that is relevant to the subject matter of the proceeding. 49 CFR 1114.21(a)(1). It is not a proper ground for objection that the information sought will be inadmissible as evidence so long as the information is reasonably calculated to lead to discovery of admissible evidence. 49 CFR 1114.21(a)(2). For good cause shown, an order may be granted to prohibit discovery in whole or in part to protect a party from an undue burden. 49 CFR 1114.21(c). If the Commission is convinced that the taking of a deposition will prevent a failure or delay of justice, it will serve an order upon the parties, and the subject witness, specifying the time when, and place where,

and the officer before whom the deposition is to be taken. 49 CFR 1114.22(c). The Commission may direct specific documents and records to produced for inspection. 49 CFR 1114.30(b).

Previous decisions were served May 27, 1987, and July 10, 1987, that denied CRC's motion to compel CSXT to produce certain documents pertaining to overhead traffic and Tyson's competing application. That information was determined to be irrelevant to CRC's application. That ruling is equally applicable to discovery requests here through interrogatories, depositions, or document production.

MOTION TO COMPEL CSXT
RESPONSES TO INTERROGATORIES

CRC moves to compel CSXT to respond to the following interrogatories originally served April 22, 1987:[1]

Interrogatory No. 3 seeks a list of industry standards for determining quality of relay and scrap rail. CRC contends this information is needed to determine the value of materials for net liquidation value of the line and to verify CSXT's engineering estimates. CSXT responds that it is not aware of "industry standards" for valuing this material. However it submitted its standards for determining quality of relay rail. Any rail that does not meet these standards, it states, is

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[1]CSXT has filed a reply in opposition to this motion.

classified as scrap.

I find that CSXT has properly responded to Interrogatory No. 3 and has supplied necessary information for CRC to verify the value of this material.

Interrogatory No. 7 asks CSXT's opinion of the characteristics and conditions that must exist to establish reasonable and efficient interchange between CRC and CSXT at Ivalee. CRC claims that more information is necessary for it to respond to CSXT's statement that interchange at Ivalee would not be efficient and would require construction of additional trackage. CSXT responds that it has already admitted that the interchange point milepost LE 445.2 proposed by CRC is the closest existing

facility to milepost LE 445.0 at Ivalee at which reasonable and efficient interchange may be conducted. CSXT states further that it has never challenged the adequacy of the interchange point proposed by CRC at Ivalee. However, it continues to believe that an interchange at Ivalee between it and CRC is not necessary for efficient rail operations. However, if the Commission determines that interchange between CRC and CSXT is warranted at Ivalee, CSXT states that the trackage proposed by CRC at milepost LE 442.5 is adequate.

The Commission will determine from the evidence on record whether CRC's operations warrant interchange with CSXT at Ivalee. I find that CSXT has

adequately responded to Interrogatory No. 7.

Interrogatory No. 9 asks CSXT to provide its costs to establish an interchange at Ivalee. CRC believes that, if interchange is established at Ivalee, it may be required to pay for trackage rights over CSXT trackage between milepost LE 445.0 and LE 445.2. It wants CSXT to provide the costs for using the trackage. CSXT responds that, should the Commission direct interchange at Ivalee, it would not charge CRC for use of the 0.2 mile of trackage to the proposed interchange point.

In view of CSXT's response, no additional response to this Interrogatory is necessary.

Interrogatory No. 15 asks CSXT to provide the location of sidings and other non-main line track between Greens and Ivalee and within 3 miles of the line that could be used as alternative interchange points. CSXT responds it has already provided CRC with valuation maps of the Greens-Ivalee line, and would agree to establish an interchange where CRC suggested at the southern end of the line at Mt. Pinson. It would also establish an interchange at Ivalee at the track suggested by CRC, if directed to do so by the Commission.

I find that CSXT has adequately responded to this Interrogatory.

Interrogatories Nos. 6, 11, 13, and

14 seek traffic information. Interrogatory No. 6 seeks the names of shippers of local and overhead traffic handled on the line since January 1, 1985. Interrogatory No. 11 seeks information about the present routes used to move traffic formerly handled on the line as overhead traffic. Interrogatory No. 13 seeks information about comparative operating times for the routes identified in Interrogatory No. 11 and routing via the Greens-Ivalee line. Interrogatory No. 14 asks CSXT to describe the factors that makes the current route preferable to the Greens-Ivalee route.

CRC claims this information is needed to enable it to counter CSXT's allegation that overhead traffic formerly handled is not available. It also wants to develop

additional information from shippers on potential overhead traffic.

CSXT responds that these interrogatories seek confidential information about overhead traffic that now moves on its Birmingham-Wellington-Gadsden route. Moreover, the same information was sought by CRC in the request for document production that was the subject of the May 27 and July 10 decisions.

I agree that the information sought by CRC for overhead traffic was previously determined to be irrelevant to its feeder line application. The May 27 and July 10 decisions noted that CRC's supporting data and projections were based on local traffic only, and no evidence was

presented to demonstrate that CRC would participate in overhead traffic. Those decisions also noted that CSXT already provided CRC with local traffic data. Moreover, CRC is a subsidiary of the principal shipper and should have access to the data relating to most of the local traffic. The decisions also rejected other reasons given by CRC for production of documents relating to overhead traffic. Those same reasons justify sustaining CSXT's objections to these Interrogatories.

Accordingly, I find that CSXT need not respond to Interrogatories Nos. 6, 11, 13 and 14.

Interrogatories Nos. 21, 22 and 23

ask CSXT to provide variable cost data on all traffic that moved on the line since January 1, 1985, and traffic data for 1985 and 1986. CRC claims the data are necessary for its request for the Commission to establish joint rates and divisions. CSXT objects that these interrogatories request the same information that was rejected as irrelevant in the July 10 decision. Also, CSXT contends that traffic and cost data are confidential and could benefit CRC as a future competitor.

I will sustain CSXT's objection to these interrogatories. As indicated in the July 10 decision, CRC's evidence of expected operations, operating plans, financial projections and traffic

prospects show that it would provide service only for traffic that originates at or is destined to stations on the line. There is nothing in the record to indicate that CRC could expect to participate in overhead traffic. CRC's speculations that it could participate in overhead movements are not sufficient reason to require CSXT to procure overhead traffic data. Those same reasons are pertinent here to sustain CSXT's objections to these Interrogatories.

The July 10 decision also rejected CRC's request for traffic data for overhead movements. Since the line now carries local traffic only, traffic data should reflect local traffic levels. As noted above, CRC has already obtained

local traffic data from CSXT and, being a subsidiary of the principal shipper, should have access to more current local traffic data. Moreover, the July 10 decision also noted that the existing operator's past experiences are not relevant for establishing joint rates and divisions. Rather, the Commission looks to the applicant's projection of future traffic and costs. I will reject CRC's request for traffic data here for the same reasons.

Interrogatories Nos. 25 and 27 seek additional information on salvaging operations for abandoned lines, including CSXT costs of using its personnel and equipment. CRC contends this information is needed to determine track removal

costs, including those relating to welded rail, for net liquidation value purposes, particularly since CSXT's estimate for removal costs is considerably less than CRC's estimate. CRC notes that although it has been provided with copies of five contracts between CSXT and outside contractors for track removal projects, those contracts provide for CSXT crews to do significant parts of the removal work.

CSXT responds that it has already provided information on removal costs in depth in the statement of Mr. Abbott and believes additional information is superfluous. Nevertheless, in its reply, CSXT has provided a breakdown of its costs in addition to the contractor's costs of removal of welded rail on its South

Collier, VA-Norlina, NC line to compare with its removal cost estimate here.

I find that CSXT has properly responded to these interrogatories.

Interrogatory No. 34 seeks information about agreements between CSXT and Tyson concerning Tyson's proposed plant at Ivalee. CRC contends this information is needed to ascertain whether CSXT and Tyson have an agreement which, in effect, would prevent CRC from serving the plant and participating in Tyson's traffic.

CSXT objects that this Interrogatory asks for the same information that was found in the May 27 and July 10 decisions to be irrelevant.

I agree with CSXT that information concerning Tyson has been determined to be

irrelevant here. CRC has not offered new reasons showing that this information is needed for its response to Tyson's application. I will, therefore, sustain CSXT's objections to this interrogatory.

Interrogatories Nos. 35, 36 and 37 seek to determine whether CSXT is trying to prevent potential competition by CRC. Interrogatory No. 35 seeks to ascertain whether CSXT is attempting to prevent CRC from handling overhead traffic. Interrogatory No. 6 asks why CSXT tried to have CRC agree not to handle TOFC/COFC traffic as a condition for voluntary purchase. Interrogatory No. 37 seeks other information about motives and anticipated effects of such actions by CSXT. CRC contends this information is

necessary to establish that CSXT's actions are anticompetitive.

CSXT replies that CRC is seeking information about negotiations that took place prior to the filing of CRC's application, in which each party was seeking to obtain the best possible deal. CSXT claims that voluntary arms length negotiations were sought by CRC's parent in an attempt to purchase the line. The negotiations failed, CSXT asserts, because the parties were unable to agree on the issues involved. It contends that, in any event, those negotiations are not relevant here.

I agree with CSXT that the information sought by these interrogatories has not been shown to be

relevant to these feeder line applications.

Interrogatories Nos. 39 and 40 seek information from CSXT about potential coal mines in Jefferson, Blount, and Etowah Counties, AL. CRC claims this information needed to ascertain the competitive effect on potential coal shippers of eliminating the Greens-to-Ivalee line and to ascertain whether potential local traffic exists. CSXT responds that it has no studies of documents about potential development of coal mines in the area that could use the line.

Since CRC asks only for existing studies or documents, I find that CSXT has properly responded to this interrogatory.

MOTION TO COMPEL TYSON'S
RESPONSES TO INTERROGATORIES

CRC moves to compel Tyson to respond to the following interrogatories originally served April 22, 1987:[2]

Interrogatory No. 2 asks Tyson to give a full description of the contributions of all persons who prepared Tyson's application. Tyson responded that counsel for CSXT prepared the application and that Tyson employees "reviewed and revised as necessary" CSXT's draft. CRC claims the response is vague and unresponsive. It believes an accurate response would "illuminate shadowy areas behind anticompetitive aspects and other

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[2]Tyson has filed a reply in opposition to the motion.

features of Tyson's application." It believes that Tyson's application is an attempt by CSXT to prevent CRC from competing for traffic between Birmingham and Gadsden, AL.

Tyson responds that it supplied the names of CSXT personnel who drafted the application and Tyson personnel who reviewed and revised draft. It asserts that CRC is now narrowing its initial question, to seek additional information that could have been included in the original interrogatory. It claims further that CRC should not use a motion to compel as a vehicle to rephrase vague questions. Finally, it argues that dissatisfaction with an initial response, which assertedly was complete and accurate, does not

justify compelling a more detailed breakdown of the same information, citing Cone Mills Corp. v. Joseph Bancroft & Sons Co., 33 F.R.D. 318 (D. Del 1963).

I agree with Tyson that it has adequately responded to this interrogatory, and no additional response is warranted. Moreover, as indicated in the May 27 and July 10 decisions, CRC had not previously demonstrated the relevance of information sought to substantiate its charge that CSXT and Tyson cooperated to preclude CRC from handling overhead traffic, handling Tyson's traffic, and competing with CSXT. The justification CRC has presented for compelling Tyson to respond to this Interrogatory still does not demonstrate that the information is

relevant to this case.

Interrogatory No. 5 seek to determine whether CSXT or any of its personnel or agents encouraged Tyson to file its application. Tyson responded that it was encouraged by CRC's application to file its application.

CRC claims that Tyson's response is evasive.

I find that Tyson's response is complete, and not evasive.

Interrogatory No. 6 seeks a description of all information provided by CSXT to Tyson to facilitate the application. Tyson responded that the information supplied by CSXT is contained in the application.

CRC contends that Tyson's answer is

unsatisfactory, for it does not discuss the extent of CSXT's involvement. Tyson responds that it has properly referred to documents in the public record to respond to the Interrogatory, and CRC's dissatisfaction with this answer is not a ground for a motion to compel.

I conclude that Tyson's response is appropriate. Again, the information sought has not, in any event, been shown to be relevant.

Interrogatory No. 13 seeks to ascertain how Tyson would move cars between the interchange track at Ivalee and any shippers that would locate on the line. Tyson responded that it is committed to serve shippers when it becomes necessary to do so, that that it

cannot be expected to provide data on frequency of service and equipment needs until a shipper locates on the trackage.

CRC asserts that Tyson's response is vague and provides no assurance that it could pick up and deliver a car in a reasonably timely manner. Tyson responds that it is unreasonable to be required to anticipate all the technical details for future service before the market data are available.

I agree with Tyson that it has appropriately responded to the interrogatory. With no other shipper on the line at Ivalee, any operating procedure would not as yet be developed to serve other shippers. The information sought is speculative and premature.

Tyson's response is adequate.

Interrogatory No. 21 seeks to determine when CSXT and CRC reached agreement for sale of the line and a full description of all the terms and provisions of the agreement. It also asks for a copy of the agreement, if available, or if an agreement has not been reached, a copy of draft agreements. Tyson responded that it and CRC reached an "agreement-in-principle" without formalized terms of sale and purchase.

CRC asserts that the exact nature and terms of a CSXT-Tyson agreement are important to the proceeding. It suggest that such an agreement would probably show that Tyson's purchase was conditioned upon prior abandonment of the line by CSXT.

Such an abandonment would do away with any service obligation by Tyson. CRC further indicates that, if a written agreement exists, it would probably contain traffic projections or guarantees and rate arrangements. It further suggests that a draft agreement may also show restrictions on service to the public that Tyson agreed to as consideration for a price below net liquidation value.

Tyson refers to the previous decisions that determined that CSXT-Tyson agreements are not material to CRC's response. It asserts further that ungrounded speculation by CRC should not be justification for a motion to compel.

I agree with Tyson. The May 27 and July 10 decisions determined that the type

of information sought by CRC is not relevant. I also agree that CRC's speculation is not justification for compelling Tyson to respond further.

Interrogatory No. 22 asks Tyson to describe how, under its operating plan, it would move cars in a 65-car unit train from CSXT's interchange track. Tyson responded that, under its operating plan, it would move a few loaded cars at a time to the unloading hopper and might circle empty cars using a trackmobile.

CRC contends that Tyson's plan was not properly considered and believes it should be required to submit a workable plan. Tyson responds that CRC is improperly using the motion to compel to criticize the substance of its operating

plan.

CRC's views on the operating plan are more appropriate for its substantive response to Tyson's competing application. As with Interrogatory No. 13, Tyson cannot be expected to have such a detailed operating plan as CRC expects at this time.

REQUEST TO TAKE DEPOSITION AND FOR PRODUCTION OF DOCUMENTS

Finally, I will consider CRC's request to depose Leland E. Tollett, Tyson's president,[3] and for production of certain documents and materials from Tyson.

CRC seeks to depose Mr. Tollett to:

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[3]Alternatively, CRC requests to depose such other knowledgeable person or persons in possession of the documents.

(a) examine the service proposed in Tyson's application; (b) determine whether Tyson is knowingly participating in a plan with CSXT to suppress potential competition with CSXT's service; and (c) learn how CRC could best meet the service needs of Tyson at Ivalee if Tyson's competing feeder line application were rejected or denied.

CRC asserts that a full explanation of Tyson's service proposal is needed, particularly whether its operations would obstruct the line and preclude service to other shippers. CRC further believes that, through deposition, it could ascertain whether CSXT and Tyson discussed suppressing or eliminating future competition. Finally, CRC argues that its

ability to serve Tyson bears on the comparative merits of the two applications. These issues, CRC contends, can be developed only through deposition.

Tyson objects to the deposition as being unreasonable and duplicating information sought in interrogatories. For example, the interrogatories ask for detailed information about Tyson's proposed service and whether its operations would obstruct the line. Tyson was also asked to describe its unloading facilities at the proposed feed mill at Ivalee. Also, Tyson was asked for its ability to handle local and overhead traffic. Interrogatories also ask Tyson to provide information on the dealings with CSXT in preparing the application.

Finally, Tyson points to interrogatories seeking information on how CRC could serve its proposed facility at Ivalee.

I am not convinced that depositing Mr. Tollett will prevent a failure or delay of justice. As Tyson points out, CRC has asked for the same information in its interrogatories. I agree with Tyson that it has provided sufficient information in its responses to CSXT's Interrogatories. Beyond the information provided, I have determined above that further answers are not warranted. Because of the duplicative nature of the request to depose, it follows that deposing Mr. Tollett is not necessary to develop additional information relevant to CRC's response. Accordingly, I will deny

CRC's request to depose Mr. Tollett.

CRC has also requested Tyson to produce certain documents and records including: the site plan for Tyson's proposed feed mill; Tyson's agreement with CSX for sale of the line; records pertaining to meetings between Tyson and CSX, and Tyson and CRC; records resulting from conversations between Tyson and CSXT where CRC was the topic of conversation; records bearing on Tyson's proposed rail and feed mill plans; records pertaining to rail service at other Tyson locations; and records relating to the filing of Tyson's competing application.

Tyson responds that CRC has not demonstrated a need to compel production of these documents, or that the

interrogatories would not supply it with sufficient data. Nor does CRC recognize that Tyson may elect to furnish these documents in responding to interrogatories, obviating the need to compel their production. Tyson has not raised other objections to specific documents requested by CRC.

It is not clear from the record whether Tyson has already produced any of the documents sought by CRC. Moreover, some of the documents sought appear either to be unavailable or contain information that has been determined not to be relevant to this proceeding. For example, CRC is seeking a copy of the Tyson-CSXT sales agreement, as well as previous drafts, memoranda, and related materials.

This same information was sought from Tyson in Interrogatory No. 21, and was determined to be irrelevant for CRC's response. Similarly, CRC is seeking documents, memoranda, and other records relating to meetings or discussions by Tyson and CSXT. These documents appear to be the same information sought by CRC in Interrogatories Nos. 5 and 6 that was determined to be irrelevant for CRC's response.

Therefore, I cannot grant CRC's motion to compel production of documents from Tyson. Should CRC continue to seek relevant information in specific documents from Tyson, it may file a supplemental motion to compel within 5 days of the service date of this decision. Tyson may

respond to the motion 5 days later. I caution CRC that requests addressing matters already resolved will not be seriously considered.

In furtherance of the July 10 decision, CRC's rebuttal evidence will be due 14 days after the supplemental motion to compel is resolved. If CRC does not file a supplemental motion to compel, its rebuttal evidence will be due 14 days from the service date of this decision.

This action will not subsequently affect either the quality of the human environment or energy conservation.

It is ordered:

1. CRC's motion to compel CSXT's

responses to certain interrogatories is denied.

2. CRC's motion to compel Tyson's responses to certain interrogatories is denied.

3. CRC's request to depose Leland E. Tollett is denied.

4. CRC's request for production of documents is granted to the extent discussed in the decision without prejudice to its filing a supplemental request for production of relevant documents, as indicated above.

5. This decision is effective on the date served.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX J

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31012

CHENEY RAILROAD COMPANY -- FEEDER LINE ACQUISITION -- CSX TRANSPORTATION, INC. LINE BETWEEN GREENS AND IVALEE, AL

Finance Docket No. 31012 (Sub-No. 1)

TYSON FOODS, INC. -- FEEDER LINE APPLICATION -- CSX TRANSPORTATION, INC. LINE AT IVALEE, AL

Decided: November 24, 1987

Cheney Railroad Company, Inc. (CRC) appealed a decision by the Director of the Office of Proceedings served August 14, 1987, that denied certain of its requests to obtain discovery from CSX Transportation, Inc. (CSX) and Tyson Foods, Inc. (Tyson) in these proceedings

involving competing feeder line applications. CSX and Tyson replied to the appeal.[1] I will deny the appeal. I will also resolve CRC's supplemental motion to compel Tyson to produce certain documents and materials.

THE APPEAL

Traffic data. CRC claims the Director erred by finding that CSX need not respond to Interrogatories Nos. 6, 11, 13, and 14 that request information about local and overhead traffic handled on CSX's line between Greens and Ivalee, AL. Interrogatory No. 6 seeks the names of

[1]Tyson petitioned for leave to late-file its reply to CRC's appeal. Since CRC does not object to the late-filing, we will accept and consider the reply.

shippers of local and overhead traffic moved on the line since January 1, 1985. Interrogatory No. 11 seeks information about the routes presently used to move traffic formerly handled on the line as overhead traffic. Interrogatory No. 13 seeks information about comparative operating times for the routes identified in Interrogatory No. 11 and routing via the subject line. Interrogatory No. 14 asks CSX to describe the factors that make the current route preferable to the Greens-Ivalee route.

The Director referred to previous decisions served May 27 and July 10 that determined that the information CRC sought on overhead traffic was irrelevant to CRC's feeder line application. In its

appeal, CRC again claims that overhead traffic data are needed: (1) to determine whether traffic density meets the jurisdictional limits permitting the Commission to order joint rates and divisions under 49 U.S.C. 10910(f); and (2) to counter CSX's assertions that CRC cannot handle overhead traffic efficiently, and there is thus no need for the Commission to order an interchange of traffic at Ivalee.

CSX responds that CRC's arguments concerning traffic density had been previously rejected. I agree. The July 10 decision considered and rejected CRC's arguments that overhead traffic data were necessary to resolve the traffic density threshold of section 10910(f). Since the

line carries only local traffic, traffic density figures should reflect local traffic levels. That data was already obtained from CSX. CRC should also be able to obtain more current traffic data from its parent, the principal shipper. CRC has not presented additional grounds here to warrant a different conclusion.

The Director also rejected CRC's assertion that overhead traffic data are needed to determine what traffic it could participate in. CRC's claims that it could participate in overhead traffic were again rejected as speculative because evidence of prospective operations, operating plans, financial projections and traffic prospects shows that the service CRC proposes to provide is for local

traffic that originates or is destined to the stations on the line.

CRC argues on appeal here that the Director erred in concluding from its operating plan that it intends to handle local traffic only. It concedes its operating plan pertains to local traffic only, because it could not predict the availability of overhead traffic. It points out that CSX had used the line for overhead movements, and at no time has CRC intended to be precluded from handling overhead traffic.

Despite CRS's intentions, the possibility that it would use the line for overhead traffic must still be considered speculation. I agree with the Director that CRC's speculation is not sufficient

reason to require CSX to produce overhead traffic data.

Accordingly, I reject CRC's claim of error in the Director's decision regarding Interrogatories Nos. 6, 11, 13 and 14.

Alleged collaboration. CRC next appeals the Director's determination that CSX need not respond to Interrogatories Nos. 34, 35, 36 and 37 and that Tyson need not respond to Interrogatories Nos. 2, 6 and 21. These interrogatories seek information about alleged collaboration by CSX and Tyson to prevent CRC from serving the plant at Ivalee or competing with CSX. As the Director noted, the information sought was previously determined not relevant to these feeder line applications.

CRC claims on appeal that the information sought concerns how CSX's efforts to prevent competition from CRC might have affected Tyson's application. It further asserts that, by denying discovery, the Director has concluded either that the dealings between Tyson and CSX did not involve an attempt by CSX to eliminate competition, or that a deliberate attempt by CSX and Tyson to eliminate competition is irrelevant to this proceeding. CRC submits that either conclusion is clearly wrong. It argues further that the information sought about agreements by CSX and Tyson concerning the proposed plant is necessary for rebuttal of CSX allegations that CRC could participate in Tyson's traffic.

CSX responds that CRC's appeal is nothing more than a collection of misstatements of fact and innuendos. It claims that the agreement for Tyson to locate at Ivalee was reached February 7, 1987, without knowledge that CRC intended to file its application, which occurred on March 19, 1987. CSX asserts that it and Tyson could not prevent CRC from competing for Tyson's traffic. If it acquires the line, CRC will connect with Tyson's trackage. With this connection, CRC will be able to compete with CSX for Tyson's traffic, and negotiate and enter into agreements with Tyson. CSX states further that it likewise may negotiate agreements with Tyson to handle its traffic. CSX believes it should no more be expected to

furnish CRC, its possible future competitor, with confidential information about agreements with Tyson than CRC could be expected to provide CSX with comparable information about similar arrangements.

The information sought on alleged collaboration by CSX and Tyson is not pertinent for CRC's rebuttal. I agree with Tyson that CRC's appeal raises no issues that impugn the soundness or integrity of previous decisions that found that information CRC sought from it and CSX about agreements between them was irrelevant. From the information supplied so far, it is obvious that CSX and Tyson have cooperated for the sale of the plant site at Ivalee and for service arrangements. However, I will not allow CRC to

pursue an unsupported speculation about an anticompetitive conspiracy by CSX and Tyson to prevent it from competing for Tyson's traffic.

CRC's principal burden in this proceeding is establishing it is financially responsible, i.e., that it is capable of paying the constitutional minimum value of the line and is able to provide adequate transportation service for at least 3 years. 49 CFR 1151.4. If this burden is met, CSX will be required to sell the line, grant trackage rights, and provide any other relief we direct. CRC has not demonstrated that the information sought from CSX and Tyson is relevant to establishing its qualifications to acquire the line.

I also reject CRC's asserted inferences from the Director's actions. The Director properly found that the information sought in these interrogatories was not relevant. No conclusion on competitive issues raised by CRC can be imputed other than that they were determined to be irrelevant to the feeder line application.

Accordingly, I affirm the Director's decision that CSX need not to respond to Interrogatories Nos. 34, 35, 36 and 37, and that Tyson need not respond to Nos. 2, 6, and 21.

Deposition. Finally, CRC appeals the Director's decision declining its request to depose Tyson's president, Leland E. Tollett. CRC claims that a deposition is

the only practical means to obtain specific information about Tyson's operating plan. CRC also notes that the Director rejected its request for additional information about Tyson's operating plans sought in Interrogatory No. 22, and in rejecting stated that Tyson cannot be expected to have such a detailed operating plan as CRC expects. CRC claims that the Director's ruling on Interrogatory No. 22 and rejection of the deposition of Mr. Tollett sets up a double standard to judge the merits of its more detailed operating against Tyson's plans.

I affirm the Director's rejection of CRC's request to depose Mr. Tollett. As the Director noted, CRC's criticisms of Tyson's operating plan are more

appropriate for its substantive response and do not justify deposition of Mr. Tollett. In any case, as the Director further noted, Tyson had provided in answers to several interrogatories, sufficient information about its proposed service. No additional grounds are presented here to warrant a different conclusion. I note further that, when deciding CRC's and Tyson's applications, each will be judged on its own merits, without comparison. Should both be found qualified, and they both accept our determination, we will require CSX to select the applicant with whom it wishes to transact business as to that part of the line for which CRC and Tyson are competing.

THE SUPPLEMENTAL MOTION TO COMPEL

The Director's August 14 decision indicated that CRC had previously requested Tyson to produce certain documents and materials. A ruling on the production request was deferred because it was unclear from the record whether Tyson had already produced the documents. The Director also noted that some of the documents and records sought had been determined to be unavailable, or the information in those documents had been deemed irrelevant to the proceeding. However, CRC was permitted to file a supplemental motion to compel to seek relevant information in specific documents; Tyson was permitted to respond.

Pursuant to the August 14 decision, CRC filed a supplemental motion to compel Tyson to produce three items. The first item sought the most recent plan showing Tyson's plan for development of the site for the proposed feed mill near Ivalee. Tyson responded that it will make available for CRC's inspection a survey of the plat on which the mill will be situated and blue-prints of another Tyson feed mill, as modified, that will be used to construct the feed mill. Tyson's response is acceptable for this document request.

The second item requests documents about Tyson's proposed operations at Ivalee. Tyson responds that no document exists on this matter other than its

feeder line application. I note that Tyson has provided information about proposed operations (see discussion infra) and find Tyson's response acceptable.

The final item requests documents and records about the railroad operations at four other Tyson facilities comparable with the feed mill being built at Ivalee. Tyson responds that no such documents exist. Even if such documents exist, Tyson claims that the circumstances and conditions of rail service at those other locations are sufficiently dissimilar to the facility at Ivalee that these productions would not lead to admissible evidence.

Tyson's application indicated that the proposed operations at Ivalee would be

similar to the procedures at four of its other locations. It is, therefore, proper for CRC to obtain discovery from Tyson to ascertain what those procedures are. If, as Tyson claims, no documents exist, then it must provide CRC with a description of the operations at those four locations. To preclude the disclosure of proprietary information, Tyson need not disclose the locations of the facilities or the rail carriers involved.

Pursuant to the schedule set out in the August 14 decision, discovery must be completed within 15 days of service of this decision. CRC's rebuttal evidence will be due 30 days from the service date of this decision.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Tyson's petition to late-file its reply to CRC's appeal is granted.

2. CRC's appeal is denied.

3. CRC's supplemental motion to compel is granted to the extent set out in the decision.

4. Discovery must be completed by [15 days from service].

5. CRC's rebuttal evidence must be filed by [30 days from service].

6. This decision is effective on the date served.

By the Commission, Heather J. Gradison, Chairman.

Noreta R. McGee
Secretary

(SEAL)